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71-268'

7 . I.A.<sup>3</sup> 89

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On August 16, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:





Abstract

IN THE

FILED

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JAN 10 1972  
HOWARD K. KELLETT, Clerk  
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

EDWARD J. MC CORMICK,

Defendant-Appellant.

Appeal from the Circuit  
Court of Kane County

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

On February 5, 1968, the defendant, Edward J. McCormick, was indicted by a grand jury of Kane County for the offense of Attempt (Burglary) in violation of Section 8-4 of the Illinois Criminal Code (Ill. Rev. Stat. 1967, ch. 38, sec. 8-4).

The matter proceeded to trial on May 7, 1968 and after a jury had been selected and the evidence begun, McCormick withdrew his previous plea and pleaded guilty. The court, having admonished the defendant of the possible consequences, accepted the plea and continued the cause for a hearing on his application for probation. On June 20, 1968, the court denied probation and sentenced McCormick to a term of 2 to 5 years in the penitentiary to be served concurrently with a sentence imposed for a conviction in Cook County.





Commencing on September 6, 1968, the defendant made various unsuccessful attempts to perfect an appeal from the judgment of conviction. The court appointed the public defender to assist him in the appeal but apparently no notice of appeal was filed. On June 28, 1971, the court appointed the Illinois Defender Project to represent McCormick but denied their motion to file a late appeal on July 3. On September 14, we allowed the motion to file a late appeal and ordered the cause docketed.

On April 10, 1972, the Defender Project filed a motion to withdraw as counsel on appeal on the grounds that the record was free from error and the passage of time has rendered the issues moot. McCormick received a copy of that motion and on May 10 filed his "motion to dismiss" the motion of the Defender.

We have carefully reviewed the entire record before us. The indictment was in good form and the plea of guilty accepted only after the trial court determined that it was both understandingly and voluntarily made. The previous record of the defendant was such that the denial of his application for probation was neither unlikely or improper.

Under these circumstances, the motion of the Defender is well taken and will be allowed and the judgment below affirmed.

LEAVE TO WITHDRAW AS COUNSEL GRANTED AND JUDGMENT AFFIRMED.

SEIDENFELD, P. J., and GUILD, J., Concur.



7 I.A.<sup>3</sup> 92

71-315

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

August 23, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Plaintiff-Appellee	)	Appeal from the 16th
	)	Judicial Circuit
v.	)	
	)	Hon. John S. Petersen
DAVID L. WHITNEY	)	Judge presiding
	)	
Defendant-Appellant	)	

MR. JUSTICE GUILD delivered the opinion of the court:

The defendant pleaded guilty on May 7, 1970 to a charge of burglary and on May 22, 1970 was admitted to probation for a period of three years. The order of probation provided the normal statutory requirements but also provided that "the defendant David L. Whitney refrain from the use of alcoholic beverages and further refrain from entering upon the premises in which alcoholic beverages are sold for the entire period of probation." A petition was filed for the revocation of probation alleging in part that the ". . . defendant. . . continued to indulge in the use of intoxicants." A hearing was held on August 26, 1971, at which time several witnesses testified that the defendant had been seen drinking beer and had been intoxicated. The trial court revoked the defendant's probation and sentenced him to 2-5 years in the State penitentiary.

The revocation of probation is a determination within the sound discretion of the trial judge. In view of the evidence presented the court did not abuse its discretion in revoking probation. (People v. Dotson, 111 Ill.App.2d 306, 250 N.E.2d 174 (1969).) In this case the evidence clearly showed that the defendant violated the conditions of his probation by consuming alcoholic beverages, primarily beer, on several occasions.





The defendant is single, twenty-six years of age, and has had nine years of schooling. It is obvious, at least upon one occasion, he was intoxicated and belligerent to the police when he was arrested. It is further apparent that the conditions of probation pertaining to the use of intoxicants did not impress him.

While it is true that a reviewing court should "proceed with caution in modifying the penalty imposed by the trial court" under the circumstances of this case, in considering the nature of the violation of probation, this court is of the opinion that the sentence imposed after revocation of probation, is excessive. People v. Turner, 129 Ill.App.2d 24, 262 N.E.2d 379 (1970).

Under the provisions of Supreme Court rule 615 (b) (3) the sentence is accordingly reduced to a term of not less than one year nor more than two years. As modified the judgment is affirmed.

AFFIRMED and SENTENCE MODIFIED.

P.J. Seidenfeld and J. Abrahamson Concur



7 I.A.<sup>3</sup> 141

71-175

STATE OF ILLINOIS

PEOPLE VS. MCKINLEY TREADWAY



ABST.

APPELLATE COURT

THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at  
Ottawa, on the 1st Day of January in the Year of our Lord  
one thousand nine hundred and seventy-two, within and  
for the Third District of Illinois:

Present—+PC

HONORABLE ALLAN L. STOUDEER, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on  
AUGUST 29, 1972

\_\_\_\_\_the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the  
words and figures following, viz:



In The  
APPELLATE COURT OF ILLINOIS  
Third District  
A. D. 1972.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	LaSalle County.
	)	_____
vs.	)	
	)	Honorable
McKINLEY TREADWAY,	)	John S. Massieon
	)	Presiding Judge.
Defendant-Appellant.	)	

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PER CURIAM

Abstract

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A motion to withdraw has been filed in the instant case by Bruce Stratton of the Illinois Defender Project who had been appointed as counsel for defendant on appeal. The motion and the record in this cause show that on January 18, 1971, defendant was indicted for theft by deception in an amount over \$150. On March 22, 1971, defendant entered his plea of guilty in the LaSalle County Circuit Court accompanied by appointed counsel and such plea was accepted and defendant was sentenced to imprisonment in the Illinois Penitentiary System for a period of not less than two nor more than six years. On December 8, 1971, this Court appointed Mr. Bruce Stratton of the Illinois Defender Project as counsel for defendant on appeal.

The motion for leave to withdraw and brief in support thereof is presented pursuant to the rulings announced in the case of ANDERS v. CALIFORNIA, 386 U. S. 738. In such motion, counsel indicates that an appeal in this case would





be wholly frivolous and could not possibly be successful. We have, therefore, examined the record completely in this cause for the purpose of determination of the issues on appeal.

As we have indicated, the record in this cause discloses that defendant entered a plea of guilty to the charge of theft by deception and was sentenced to a term of two to six years pursuant to plea negotiations and recommendations.

No issue can be raised to challenge either the indictment or the sentence in this cause as indicated by the appellate counsel. Sentence in this cause was imposed as a result of negotiations between defense counsel and the State's Attorney with the knowledge of the defendant. The minimum sentence of two years is only one year more than the statutory minimum. The sentence, we feel, is reasonable in light of defendant's substantial criminal record which discloses that he had convictions in at least four felonies. The maximum of six years follows a three to one ratio which had been recommended in the American Bar Association Standards relating to sentencing procedures. The court also expressly concurred in the State's recommendation.

There was specific compliance with Supreme Court Rule 402. The trial court personally questioned defendant on his understanding of the charge and was asked expressly if he had read the indictment and the court had him explain his understanding of the nature of the charges against him in the indictment. The defendant clearly expressed the nature of the charge of grand theft and taking money from Baker Ford in Streator, Illinois. The court also advised him of the minimum and maximum sentences which might be imposed and determined that he clearly understood such explanation. He was also advised of all of his rights including an application for probation, the right to plead not guilty or to persist in that plea if it has already been made or to plead guilty. He was also advised of his constitutional right to remain silent and



also that he was giving up his right to a trial by jury and that he would be presumed to be innocent until proven guilty, and that the State must prove his guilt beyond a reasonable doubt; and that he would have the right to cross-examine the State's witnesses and offer evidence on his own behalf. The court also specifically determined that the plea was voluntary and that there was a plea bargaining agreement as between the State's Attorney and the defendant through his counsel. The court also determined that he understood specifically that such plea bargain was acceptable to defendant and the court determined the factual basis for the plea of guilty. Defendant indicated that he was satisfied with the plea and with the proposed sentence. It was also indicated by the court that the trial court did not initiate the plea bargaining discussion or enter into it in any way but that he intended to follow the agreement if a guilty plea was entered. Evidence in aggravation and mitigation was heard.

Upon a complete examination of the record, therefore, we find that the judgment of the Circuit Court of LaSalle County should be affirmed and that there has been adequate compliance with ANDERS v. CALIFORNIA, supra. The judgment of the Circuit Court of LaSalle County is, therefore, affirmed.

We have previously entered an order in this cause authorizing withdrawal of appointed counsel pursuant to the motion to withdraw.

Affirmed.





7IA<sup>3</sup>

ABST.

7 I.A.<sup>3</sup> 146

55672

PEOPLE OF THE STATE OF ILLINOIS, )

Plaintiff-Appellee, )

v. )

ALLISON HOFFMAN (Impleaded), )

Defendant-Appellant. )

APPEAL FROM THE CIRCUIT

COURT OF COOK COUNTY.

Hon. Edward E. Plusdrak,  
Presiding.

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendant was charged with armed robbery. After a jury trial, he was found guilty of that charge and sentenced to a term of 15 to 30 years. On appeal, defendant, through his counsel, contends that he was not proved guilty beyond a reasonable doubt, and that the court erred in allowing a certain gun to be introduced into evidence. Additionally, we will consider other issues raised by defendant in a pro se supplemental petition.

On February 20, 1969, at about 12:30 p.m., two men entered the Mount Prospect Jewelers and robbed the owner, a salesclerk and two customers of approximately \$13,000 in jewelry and cash. The two men first inquired about watches, then drew guns and announced that it was a stick-up. At trial, all four victims identified defendant as one of the two robbers. Defendant was described as the shorter of the two men and as having a high-pitched voice. While his associate tied and gagged the victims, defendant gathered up the jewelry and money. The robbers were in the store for about 15 to 20 minutes, and the lighting was good.

Loretta Piepenbrink, the salesclerk, testified that she spoke with defendant for about five minutes before he drew the gun. Defendant was 5'5" and weighed 150 pounds. He wore work clothes, consisting of checkered trousers, a long jacket, high-top shoes and a baseball cap.

LaVerne Funk, owner of the store, testified that defendant marched the salesclerk to the rear of the store at the point of a gun. Defendant weighed 160 pounds, was between 5'4" and 5'6"; and wore gray checkered pants, a brown jacket and a baseball cap. Defendant's associate held a gun to Funk's head, and People's Exhibit No. 1 appeared to be that gun.

Jack Legg, a customer, testified that as he entered the store,



he was confronted by defendant waving a gun. Legg stated that defendant was 5'4" or 5'5" and weighed 150 pounds. He wore checkered trousers, a tan jacket and a baseball cap. Legg also testified that People's Exhibit No. 1 looked like the gun used by defendant during the robbery.

Helen Bierbaum, the other customer, testified that she was also confronted by defendant as she entered the store. He placed a gun against her back and marched her to the rear of the store. Defendant was 5'5", weighed about 160 pounds, was wearing black and white checkered trousers and a waist length jacket.

Norbert Gutowski, a bartender, testified that on the afternoon in question, defendant, along with Arnold Vitek, entered his tavern and placed a quantity of jewelry on the bar. On the following day, Gutowski accompanied defendant and Vitek in an attempt to sell the jewelry. Gutowski sold two guns belonging to Vitek.

William Hastings, an Indiana police captain, testified that he held a second job as a salesman at Sam's Loan Company in Indianapolis. On March 24, 1969, Hastings saw defendant sell diamond rings to the loan company proprietor. Six weeks later, defendant sold a watch at the store. On October 4, 1969, when defendant entered the store to sell two rifles, Hastings arrested him and recovered a pawn ticket containing the record of sale of a .38 automatic gun to the loan company. People's Exhibit No. 1 was the gun recovered at the loan company, and the records showed that the gun had been brought to the store by "A. Hoffman."

Defendant testified that on February 20, 1969, he was employed by Arnold Vitek as a laborer. On that day, there was no work because of labor trouble. Defendant went home, and at 11:00 a.m. ate lunch at the Central Avenue Y.M.C.A. in Chicago. At 12:30 p.m. he went to a store on Milwaukee Avenue to buy trousers and a jacket, and was at the store until 1:00 p.m. He did not rob the Mount Prospect Jewelers, and was never in that store. Defendant did sell jewelry for Vitek, who was in a desperate financial condition. Defendant sold some of the rings at work, and the rest at Sam's Loan in Indianapolis. Defendant was in Gutowski's tavern with Vitek and they had some



jewelry, but it was on February 21, not on February 20. Defendant also testified that he was 5'5" and weighed 170 pounds, but never wore a baseball cap or checkered trousers. Defendant obtained possession of the .38 gun, People's Exhibit No. 1, in a trade in September, 1969 at Brazil, Indiana. He now lived in Muncie, Indiana.

Prior to trial, the court conducted a hearing on defendant's motion to strike the identification testimony because of unfair and suggestive pre-trial procedures. At that hearing, the four victims testified that about five or six days after the robbery, they were asked by the police to view eight to fifteen photographs of white males. Each viewed the photographs separately and independently from the others. All four selected defendant's photograph. Each testified that no emphasis was placed on any one photo nor was there any suggestion or inducement by the police to select one photo. No lineup was conducted. The court denied the motion to strike the identification testimony.

We reject as without merit defendant's contention that he was not proved guilty beyond a reasonable doubt. Four occurrence witnesses with ample and excellent opportunity to observe made positive in-court identifications of defendant as one of the perpetrators of the armed robbery. The testimony of the State's witnesses was clear, consistent, positive and convincing, and it was sufficient to prove defendant guilty beyond a reasonable doubt. It is also clear that the pre-arrest photographic procedures employed by the police were proper, and that the identifications were not improperly induced by suggestive procedures.

Defendant also maintains that the trial court committed reversible error in allowing a .38 gun to be introduced in evidence. He argues that the weapon was not properly connected to him or to the crime.

Where evidence indicates that an accused possessed a weapon at the time of the crime, a similar weapon found in his possession at the time of his arrest may be introduced against him, even though not identified as the weapon actually used in committing the crime. People v. Gambino, 12 Ill.2d 29, 145 N.E.2d 42. Where a proper connection is established and it is shown that the accused possessed a weapon which could have been used in the commission of the offense,





it may be admitted in evidence. People v. Mikka, 7 Ill.2d 454, 131 N.E.2d 79.

In the case at bar, one of the victims testified that the gun in question looked like that used by defendant in the robbery. Officer Hastings testified that the pawn ticket he recovered revealed the sale of the gun in question to the loan company. The company records showed that "A. Hoffman" pawned the revolver, and the weapon itself was recovered at the loan company by the officer. The evidence thus established that defendant used a gun similar to the one in question during the commission of the robbery, and that, subsequent to the crime, he had possession of the gun introduced into evidence. The court did not err in admitting the gun into evidence.

Defendant has raised additional issues in a supplemental pro se brief. He first urges that the court erred in permitting hearsay testimony concerning out-of-court photographic identifications. At trial, the victims testified that they selected defendant's photo from a number as being one of the robbers. Defendant did not object to the admission of the testimony, and therefore waived all errors in its admissibility. See People v. French, 33 Ill.2d 146, 210 N.E.2d 540. Moreover, under the instant facts and circumstances, even if the testimony was hearsay, its introduction was harmless error and would not warrant reversal.

Defendant also maintains that the court committed reversible error in the giving of two of the State's instructions. He first contends that giving the instruction which defined circumstantial evidence (I.P.I.-Criminal 3.02) was improper because none of the evidence offered at trial was circumstantial.

The instruction on circumstantial evidence was properly given. It clearly reflected evidence introduced during trial. People v. Guido, 321 Ill. 397, 152 N.E. 149. The weapon and pawn ticket are two examples of such evidence. We reject as without merit defendant's further argument that it was improper to give the instruction admonishing the jury that their verdict must be unanimous (I.P.I.-Criminal 26.01).

Defendant also argues that the trial court erred by not conducting a full competency hearing. Some months prior to trial,



defendant, through his counsel, requested and received an examination as to his mental condition by the Behavior Clinic of the Circuit Court of Cook County. The examination revealed that defendant knew the nature of the charge and was able to cooperate with his counsel. No subsequent request was made for a competency hearing.

Only where a bona fide doubt arises as to the ability or competency of the accused to stand trial, is there a duty imposed on the trial court to impanel a jury in order to determine the accused's competency. People v. Milligan, 28 Ill.2d 203, 190 N.E.2d 753. In the instant case, the court had before it a favorable report by a psychiatrist concerning the ability of defendant to stand trial. Moreover, the record clearly reveals that defendant fully understood the nature of the charge, and participated fully in the trial. No error was committed in not conducting a competency hearing.

Defendant next contends that his representation at trial by court appointed counsel was so incompetent and inadequate as to deprive him of due process. It is well settled that the incompetency of counsel necessary to constitute denial of an accused's right to counsel must be conduct of such defective character as to make the defense a farce. People v. Dean, 31 Ill.2d 214, 201 N.E.2d 405.

In urging the incompetency of his counsel, defendant points primarily to counsel's failure to request a competency hearing. As we have noted, the failure to request a competency hearing was not incorrect. If any of defense counsel's decisions were incorrect, they could be characterized only as errors in judgment. Such errors in judgment do not constitute incompetency. People v. Washington, 41 Ill.2d 16, 241 N.E.2d 425. Indeed, an examination of the record discloses that in the face of overwhelming State's evidence, counsel conducted an able and vigorous defense.

Defendant finally argues that the sentence of 15 to 30 years was excessive. At the hearing in aggravation and mitigation, it was brought out that defendant had seven previous criminal convictions, including convictions for robbery and assault to kill. In view of the gravity of the instant offense and defendant's prior criminal record, we do not believe that the sentence imposed was excessive.





Accordingly, the judgment of the circuit court is affirmed.

Judgment affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.



55520



ABST.

7 I.A.<sup>3</sup> 155

IRVING MOEHLING, et al.,	)	
Plaintiffs-Appellees,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY.
	)	
CITY OF DES PLAINES, a body	)	HONORABLE
politic and corporate,	)	EDWARD J. EGAN,
	)	PRESIDING.
Defendant-Appellant.	)	

MR. JUSTICE DRUCKER delivered the opinion of the court:

This is an appeal of a declaratory judgment declaring defendant's R-2 Single-Family zoning of the subject property unconstitutional and permitting plaintiffs to build structures permitted under Multi-Family zoning.

On appeal defendant contends that (1) plaintiffs failed to overcome the presumption of the validity of the single-family classification; (2) the court exceeded its jurisdiction in suggesting and then allowing plaintiffs to bring in a plan for apartments which was never presented to the City; and (3) plaintiffs failed to exhaust their administrative remedies.

Plaintiffs acquired the subject property by gift and inheritance. It has belonged to their family for about a century. The subject property consists of six parcels of vacant land adjoining and surrounding the intersection of Rand and Wolf Roads in the City of Des Plaines. Parcel F (.64 of an acre on the southwest corner) is the subject of a \$90,000 option contract with the American Oil Company for a service station. There is no other commitment to sell or develop any of the subject property.

Parcel A consists of 6.74 acres at the northeast corner; Parcel B consists of 7.57 acres at the northwest corner; Parcel C consists of 1.33 acres along Wolf Road contiguous to the northerly line of Parcel B; Parcel D consists of 5.47 acres and is located



235 feet west of the southwest corner; Parcel E consists of .69 of an acre along Wolf Road, 150 feet south of Rand; and Parcel F consists of .64 of an acre and forms the southwest corner.

In 1966 plaintiffs applied to the City for rezoning of the subject property as follows: C-1 Neighborhood Shopping District as to Parcel A; C-2 Commercial District as to Parcels B and F; and R-4 Multiple-Family Residence District as to Parcels C, D and E. The Zoning Board recommended rezoning of Parcels A, B, E and F as requested, but recommended denial as to Parcels C and D. The Mayor and City Council of the City of Des Plaines denied the rezoning requests as to all parcels. This suit followed.

Rand and Wolf Roads do not meet at a 90° angle but rather meet in an "X" configuration with the northwest and southeast corners being formed by the acute angles and the northeast and southwest being formed by obtuse angles. With the exception of a triangular parcel of land on the southeast corner bounded by Rand and Wolf Roads with a gasoline station and apartment building on it and several parcels of vacant land also owned by plaintiffs, the subject property is surrounded by single-family residences. The entire area for at least several blocks in any direction (excluding the exceptions mentioned above) is zoned single family. Cumberland and Chippewa Junior High School are three blocks to the south of the subject property. Roughly a quarter of a mile southeast on Rand Road and north of Rand Road there is an area zoned M-2 Manufacturing which is contiguous to railroad tracks which run north and south in that area. To the west of this M-2 area is an R-4 Multiple zone with apartment buildings which acts as a buffer between the M-2 area to the east and R-2 to the west. On the south side of Rand Road across the street from the M-2 is a C-2 Commercial area which is also contiguous to the railroad tracks.



One-quarter to one-half mile southwest of the subject property are two C-2 areas with a small C-1 in between, all of which are contiguous to the Northwest Highway and the Chicago and Northwestern Railroad tracks.

About a quarter mile to the northwest of the subject property at Rand and Central is a C-3 area.

Finally, about a quarter mile north-northwest of the subject property at Wolf and Central Roads is a C-2 area with an R-4 area buffering the contiguous R-2 area. Across the street from the C-2 use is a dry cleaner on the southeast corner surrounded on the south and east by 20 acres of vacant land.

At trial on plaintiffs' proposed commercial uses for Parcels A, B and F and for multi-family uses for Parcels C, D and E the plaintiffs offered the following testimony.

Irving Moehling, one of the plaintiffs:

He was part owner of the subject property. If the zoning were changed Parcel A would be used for an office building; Parcel B for a neighborhood shopping center and automotive service center; Parcels C, D and E for multi-family apartments; and Parcel F for a gasoline service station. Except for a written option contract for Parcel F the subject property is not subject to any contracts. He was a member of the Des Plaines Plan Commission from 1959 to 1966 and was familiar with the 1958 Comprehensive Plan under which the subject property was zoned R-2. The City had rezoned property to commercial that backed up on single-family residences, noting Mount Prospect and Rand Roads, the four corners of Wolf and Central, Northwest Highway and Cambridge and the northwest, southeast and southwest corners of Lee and Oakton.

He has numerous offers for the property zoned multiple residential or commercial. Robert Blume, current chairman of the Plan Commission, offered to buy a parcel adjacent to the subject property for single-family homes.





When asked what attempts he had made to sell the subject property for single-family use, Moehling replied, "We made no attempt to develop this for single-family purposes. Or to sell it, for that matter."

John H. Geiger, an architect and engineer:

He was a member of the Des Plaines Plan Commission from 1956 to 1964. By comparing the 1958 Comprehensive Plan and the zoning map of the City as of December 31, 1968, he found several places where properties fronting on heavily travelled roads and adjacent to single-family homes were rezoned commercial even though originally single family under the Comprehensive Plan of 1958.

Taking into account the nature and quality of single-family homes in the area, the economic demands in the area and the problems of creating a high quality single-family residence site on a heavily travelled street, it is his opinion that the proposed use of the land would probably give the best economic return and be compatible with similar developments that now exist along Rand Road. To the best of his knowledge the proposed use would have no detrimental effect on the surrounding existing uses.

He believes that property fronting on heavily travelled roads would be a very poor use of land for the quality of single-family homes being built in Des Plaines. There are areas in Des Plaines where there are single-family houses which either face onto or back up to heavily travelled streets including River Road, Wolf Road, Golf Road, Algonquin Road and Oakton Street. As chairman of the Plan Commission he had approved subdivisions adjoining busy highways including the Des Plaines Terrace Subdivision which lies on the north side of Rand Road just east of Parcel A.

Robert Blume, home builder and chairman of the Des Plaines Plan Commission:

He was still interested in buying the land adjoining the



subject property to build single-family homes in the \$50,000 range. He was interested in buying as much single-family residential property in that area (subject property) as he could. He was also interested in purchasing the land for multiple. He did not feel that the proposed use would have a detrimental effect on the surrounding property and in fact he would not hesitate to develop the surrounding property for single family.

The homes located west and north of Parcels D, E and F, although built around World War II, are "better than average, \* \* \* extremely well maintained. They are in a development with many, many fine shade trees, and the materials and quality workmanship, and so forth, in the various homes is especially good." He said further that he would be interested in purchasing ten acres for single-family development but that he might not build, develop and sell houses at a profit adjacent to a major highway. He has a subdivision on River Road in which the side yards of three houses out of 68 face River Road. He found it difficult to sell these homes.

William F. Lawrence:

He was a city planner and zoning consultant hired by plaintiffs to prepare the proposed plan. His plan would have no detrimental effect on the surrounding area. He had separated commercial and residential traffic. Based on his experience as a planning and zoning consultant the proposed plan would be the highest and best use of the subject property. In reaching his conclusion he considered the trend of development at major intersections. Parcel F, the proposed service station, lies across the street from an existing gasoline station, the existing R-4 multiple-family use lies across the street from a similar proposed use which would face Rand Road and back up to single-family uses. He was never asked by the plaintiffs to lay out a single-family subdivision. It would



be possible to lay out the subdivision so that virtually none of the single-family lots would face onto Rand or Wolf Roads. He has designed such subdivisions. "There will be no more cars generated by the development [proposed use] than if the whole thing was developed for single family homes." In his opinion from a planning and zoning standpoint the development of the subject property for single-family use would not be desirable because it is an excellent site for a higher density use and will provide services and conveniences to the neighborhood.

Ralph H. Martin:

He is plaintiffs' real estate broker, is a real estate appraiser and former alderman from the ward in which the subject property is located. The Rand Road traffic count in the area of the subject property is about 20,000 in each direction as of 1966 and the count on Wolf Road as of 1966 is 7500-9000 in each direction. In his opinion the highest and best use for the subject property is for a combination of commercial and multiple-family uses and that the proposed plan was the highest and best use. His opinion as to the fair cash market value of the subject property as currently zoned is \$330,000 and if rezoned according to the proposed plan, the property would be worth \$1,200,000.

It is his opinion that the property is not suitable as presently zoned for several reasons: The surrounding homes are in the \$40,000 to \$50,000 range and homes cannot be sold in this price range which back up against Rand and Wolf Roads and "the configuration of the land has sharp angles at intersections, particularly the northwest corner." A subdivider backed homes up to Rand Road southeast of the subject property seven or eight years ago and that "isn't even good looking." It is his opinion that the proposed use would be readily marketable and that it would not





have a detrimental effect on existing uses. His company did not list the property for single family because the above-mentioned subdivision "looked terrible." His company, Kunkel, will get a fee based on a percentage of the sale price of the property. The Cumberland area, adjoining the subject property on the south, "is considered one of the better residential areas in the City of Des Plaines." The Marathon station and Burger King at Central and Rand Roads were developed and are still located in the county, outside the City of Des Plaines.

His firm did not advertise for single family; he determined the value as zoned from conversations with builders. He has never advertised the subject property for anything except commercial and/or apartment uses. In his opinion you could not build \$40,000 to \$50,000 homes into the intersection of Rand and Wolf Roads.

John J. Kasper:

He was a director of real estate for Dominick's Finer Foods. He had contacted Irving Moehling for the purpose of exploring the possibility of the installation of a Dominick's Food Store under a lease of 30,000 to 40,000 square feet in a shopping center shown on Parcel B of the site plan.

Frank Gregory Opelka:

He is a real estate appraiser for the plaintiffs. The highest and best use of the subject property is the proposed use. In his opinion the fair market value of the subject property, if rezoned, is \$1,045,000 and as presently zoned is worth \$350,000.

When asked if he thought this was a suitable location for single-family homes he replied, "[Y]es, you could build homes in this area in Des Plaines and sell them." Single family would not be the highest and best use. He based his opinion on the traffic nuisance of the intersection of Rand and Wolf Roads. He is also of the opinion that the proposed use would not have an adverse



effect on the surrounding property since the proposed plan allows for sufficient buffering between single-family and higher uses. He feels there is a demand for this type of usage. He described the Cumberland area as being "very desirable."

The defendant presented the following evidence.

Daniel J. Ferrone, a planning and zoning consultant:

He prepared a plan for a single-family subdivision (Defendant's Exhibit 6) on the subject property and adjoining property owned by plaintiffs. Including only the subject property he estimates there would be 57 lots. This subdivision complies with the extension of all existing streets and all the lots would face inward from Rand and Wolf Roads, except seven lots on Wolf Road. These lots would front on Wolf Road as a normal continuation of the existing development of single-family houses facing Wolf Road south of Princeton. In his opinion the highest and best use of the subject property is for single-family dwellings. The proposed use would have an adverse effect on the adjoining single-family property. The existing gas station does not have a deleterious effect because "it is a non-conforming use, now, and also, the fact that there is such a wide road at that point, almost 83 feet, perhaps extended to 100 in the future, isolates the existing station from the rest of the development of the subject property to single-family." Further non-single family use would compound the error of the existing gas station and apartments.

About 35 single-family homes were built along Rand Road from 1958 to 1966. He stated that Parcels E and F could be devoted to apartment buildings.

Paul Leason, a real estate appraiser:

On the east borderline of Parcel A is a subdivision of



single-family residences known as the Des Plaines Terrace, which appear to have been built between 1960 and 1965, containing homes worth \$30,000 to \$40,000. To the north of Parcels B and C are single-family residences in what is known as the Sunset Ridge subdivision, which appear to have been built around 1955, containing homes in the \$30,000 to \$40,000 price range. West of Parcel D are single-family residences built in 1945 and after World War II in the \$35,000 to \$40,000 price range.

To the south of Parcel D is vacant land (owned by the plaintiffs but not part of this lawsuit) and then going south and west is the Cumberland subdivision with well-kept homes built in the late 1920's and 1930's in the \$40,000 to \$50,000 price range.

The highest and best use of the subject property is that the frontages on Rand Road of Parcels A, B, D and F and the frontages on Wolf Road of Parcels A, B, F and E ought to be improved with apartments. B and D should be developed with apartments only along the frontage and the balance of the parcels should be used for single family. F and E should be combined into one site for an apartment building. There are adequate shopping and gasoline service facilities already available in the area. In his opinion plaintiffs' proposed plan would have an adverse effect on the surrounding property. The apartments he proposed should be in keeping with the R-4 existing apartment building. He does not think the apartments in the proposed plan would sufficiently "buffer" the proposed commercial uses.

Dr. Gerald Meyer:

He represents a home owners group in the area of the subject property and believes as a home owner that the proposed plan would have a depreciating effect on the property values of the single-family homes.





Richard D. Hamill:

He is a real estate broker and in 1966 was a member of the advisory board for the Sisters of Mercy, particularly St. Patrick's Academy, an all-girl Catholic high school. In the summer of 1966 Parcels D, E and F and the vacant land adjoining on the south were offered to him for the Sisters of Mercy for a new school site by the William Kunkel Company. Mr. Kehrner of Kunkel offered the property for \$450,000.

Leo G. Wilke, a traffic engineer:

He gave a detailed description of the intersection of Rand and Wolf Roads, including curbs, street widths and signals. Plaintiffs' proposed plan has nine driveways on Rand Road and eight on Wolf Road. In addition the proposed plan shows four openings in the median on Rand Road and eight on Wolf Road. There would be 185 conflict points created by the proposed plan. None of the changes in the median would be allowed under the official published policy of the Division of State Highways and the intersection of Wolf and Rand Roads is not programmed for any improvement either by the State of Illinois or Cook County. Eighty-seven single-family homes would result in 957 vehicle trips per day as compared to 5990 vehicle trips per day under the proposed plan.

Rand Road is classified as a primary highway by the State of Illinois and Wolf Road is a federal aid secondary route under state maintenance. A developer would have to get state or county approval to make any changes in the roadway.

There are single-family homes fronting on Wolf Road from Princeton south to Golf Road. There are normal driveways from these single-family houses out onto Wolf Road. If the subject property were to be developed for single-family purposes, it would be possible under the ordinances of the City of Des Plaines to have



ingress and egress from single-family homes onto Rand Road and Wolf Road, but it would be necessary to sacrifice one lot in each tier. There would be less traffic conflict and turbulence with the defendant's single-family plan.

The court then ruled that the proposed plan was not sufficiently specific and therefore it would not grant any commercial use except across the street from the existing gasoline station. The court further held that "just because there are other intersections which have commercial uses does not render that such an opening up that would require commercial uses in this area."

The court further stated, "The evidence before me, even by the witness for the plaintiffs, I think, Mr. Blume said that he would take all of the single family property that he could get in that area. There is no question but that this property, the trend of the development has been single family \* \* \*. It has not been shown to me that single family is incapable of development in that area."

The court further held that it would grant relief for a gasoline station or automotive use on Parcel F and a multiple use on E or E and F in accordance with Leason's testimony. The court would deny relief on A, B, C and D unless the plaintiffs presented a specific multiple-family plan.

The court then allowed the plaintiffs to amend their complaint and reopen the evidence.

John D. Cordwell, an architect and city planner, presented plaintiffs' plan for three five-story apartment buildings, one containing 100 units and two containing 50 units each; two four-story buildings containing 68 units each; ten townhouses; and one three-story apartment building containing 24 units for a total of 370 units (hereafter referred to as the "370 plan").



Cordwell stated that if this development complied with the "planned development amendment" to the Des Plaines zoning ordinances, then up to 390 apartments would be allowed under an R-4 zoning. He did not know if the plaintiffs had complied with the ordinance amendment. He then stated there would be limited ingress and egress points to Wolf and Rand Roads.

He testified that he was never instructed by the plaintiffs to take a look at the property in its present state and come up with his own independent judgment as to what the highest and best use of the land would be but was merely directed to prepare a multiple-family plan for the subject property. His plan was informally presented to the City Council and was informally rejected.

Ralph Martin's testimony was similar to his original testimony except that under the 370 plan the property would be worth \$925,000.

Irving Moehling testified that there was never any hearing before the Zoning Board or the Planning Commission pursuant to any application by plaintiffs for this plan.

Daniel J. Ferrone testified for the defendant that the proposed density of the 370 plan is entirely out of keeping with the general development of the area. He felt the five-story buildings (about 45 feet tall) would be incompatible with the heights already established on the surrounding property (average about 20 feet).

Leo G. Wilkie testified that the driveway entrances were dangerous because they are too close together. The 370 plan will in his opinion deteriorate the safety of the intersection of Rand and Wolf Roads.

He further stated there would be 4070 automobile trips per day under the 370 plan as opposed to 968 if the property were developed as single family.



Robert Bowen, City Engineer for the City of Des Plaines, testified that the closest interceptor sewer to the subject property was a 54-inch interceptor running down Rand Road. It was his opinion that the sewer is already overloaded causing it to back up in heavy rains into basements through manhole covers and into Weller Creek. He estimates that the 370 plan would put a load on the sewers four times as great as defendant's single-family plan (26,400 gallons per day versus 110,000 gallons per day for the 370 plan). His opinion is based on personal observations several blocks from the subject property.

Irving Moehling testified in rebuttal that he is a registered mechanical engineer and that the interceptor sewer under Rand Road is 63 by 70 inches according to the original plans. It was built in 1962. He lives nearby and has not been familiar with any overflow out of manhole problems. He described the effect on the sewer system of the 370 plan as "negligible" and stated that any flooding south of Rand Road is caused by Weller Creek overflowing into a smaller interceptor which was built in 1952. The 1962 and 1952 interceptors are connected.

The court then denied relief according to the 370 plan as being too dense but said it would approve a plan in accordance with the City's R-4 zoning. Over the defendant's objections plaintiffs were again allowed to reopen the proofs, amend their complaint and offer a third plan.

John D. Cordwell subsequently testified to a 315 unit plan. Defendant objected on the ground that this plan had never been submitted at the local level and that plaintiffs had not exhausted their remedies at the local level.

The court declared the R-2 zoning of the subject property invalid and of no effect as applied to the subject property and permitted plaintiffs' 315 unit plan and a gasoline service station on Parcel F.





OPINION

On appeal the defendant contends that the plaintiffs did not overcome the presumption of validity of the R-2 single-family classification.

The plaintiffs, in urging that the R-2 classification is arbitrary and unreasonable, claim that the subject property adjoins heavily travelled roads--Wolf and Rand--and is therefore unsuitable for single-family homes. However, plaintiffs' architect, Geiger, stated that there are areas in Des Plaines where single-family homes adjoin heavily travelled streets including the Des Plaines Terrace Subdivision on the north side of Rand Road just east of Parcel A. Plaintiffs' appraiser testified that single-family homes could be built and sold in this area in Des Plaines. "Our Supreme Court has often held that a single-family classification is not invalid because it fronts on a heavily traveled street." Jans v. City of Evanston, 52 Ill. App.2d 61, 72, 201 N.E.2d 663, 668.

Plaintiffs also claim that the value of the subject property would be increased three or four times if the property was rezoned. As in almost every zoning case the subject property would be worth more if rezoned. We have held that this factor alone is not enough to render a zoning ordinance invalid. Union National Bank of Chicago v. Village of Oak Lawn, \_\_\_ Ill.App.3d \_\_\_, 273 N.E.2d 461.

Plaintiffs argue that although the subject property is surrounded by single-family homes, except for a gas station, a non-conforming use, and a two-story twelve-unit apartment building at the southeast corner of Rand and Wolf Roads, the trend of development adjacent to Rand and Wolf Roads has been commercial and multiple family.

"In determining the validity of a zoning classification, the question of whether or not it is in conformity with surrounding existing uses and the zoning classification of nearby property



is considered of paramount importance." Manger v. City of Chicago, 121 Ill.App.2d 358, 367, 257 N.E.2d 473. In Manger we held that the subject property did not take its character from an R-4 multiple-family residence zone across the railroad tracks to the east but rather from the exclusively single-family areas to the south and west. In the case at bar we have an even stronger case for single-family zoning. The gas station is a non-conforming use which is buffered by a two-story apartment building. The surrounding area in all directions is either single family or vacant land owned by the plaintiffs. The trial judge refused to permit a rezoning for commercial uses, stating:

It's been argued here that because there are commercial uses at various intersections throughout Des Plaines that therefore that opens up this particular intersection to commercial use. I have not been satisfied to that extent. I hold that simply because there are other intersections which have commercial uses does not render that such an opening up that would require commercial uses in this area.

We are not impressed with plaintiffs' assertion that no new homes have been built recently adjacent to Rand or Wolf Roads near the subject property. It is apparent from the evidence that the plaintiffs own all the vacant land along Rand and Wolf Roads in the immediate area.

Finally, the plaintiffs contend that the defendant has shown no reasonable basis in the public welfare for the single-family restriction.

The regulation of density in itself is an element of the public welfare. In Exchange National Bank v. Cook County, 25 Ill. 2d 434, 441, 185 N.E.2d 250, 254, the court stated:



We have carefully considered all of the elements of this case as above indicated. We are not unmindful that the plaintiffs acted in good faith in proceeding with plans to construct town houses on the subject property under the R-5 [multiple family] classification. However, it is our conclusion that the R-4 [single family] classification of the subject property is not an unreasonable one, and does have a tendency to promote the public health, safety and welfare of the inhabitants of the area. The tract is located near the center of a residential area which is, generally speaking, a single-family one. The regulation of density, as related to land use, is a legitimate object of police power.

In addition there is evidence of serious traffic and sewage problems which are clearly matters of "public health, safety and welfare."

In Reese v. Village of Mount Prospect, 72 Ill.App.2d 418 (Abst.), 219 N.E.2d 682, a somewhat similar fact situation existed on Rand Road in Mount Prospect. There, the entire area southwest of Rand Road, with a few minor exceptions, was residential; the subject property faced "a pancake house, a bowling alley and a movie theater." The court rejected a change from single-family zoning.

In Exchange National, supra, at 440, the court set out the following guideline:

Before a court will intervene it must be established by clear and convincing evidence that the ordinance, as applied to plaintiffs, is arbitrary and unreasonable and has no substantial relation to the public health, safety or welfare. These rules are based upon a recognition that zoning is primarily a legislative function, subject to court review only for the purpose of determining whether the power, as exercised, involves an undue invasion of private constitutional rights without a reasonable justification in relation to the public welfare. [Citations omitted.] Where it appears, from all the facts, that room exists for a difference of opinion concerning the reasonableness of a classification, the legislative judgment must be conclusive.





We conclude that plaintiffs did not establish by clear and convincing evidence that the ordinance was arbitrary or unreasonable as applied to their property nor that the ordinance had no substantial relation to the public health, safety or welfare.

We therefore find the R-2 Single-Family zoning of the subject property is valid. This decision renders further consideration of defendant's contentions on appeal unnecessary.

The judgment of the circuit court is reversed and remanded with directions to enter judgment for the defendant and against the plaintiffs.

REVERSED AND REMANDED WITH DIRECTIONS.

LORENZ, P.J., and ENGLISH, J., concur.

ABSTRACT





56308

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

CHARLES JONES,

Defendant-Appellant.

ABST.  
I.A. 183

)  
) APPEAL FROM THE  
) CIRCUIT COURT OF  
) COOK COUNTY

)  
) HON. DANIEL WHITE,  
)  
) JUDGE PRESIDING.

MR. JUSTICE BURMAN delivered the opinion of the court.

The defendant, Charles Jones, was charged by complaint with the offense of theft. After a bench trial, he was found guilty as charged and sentenced to confinement for a period of six months.

On appeal, he contends that the Complaint did not allege and the State did not prove ownership of the stolen property in a person, corporation, or other entity capable of owning property.

The facts involved are relatively simple. On April 20, 1971, the defendant was arrested in a Walgreen Drug Store located at 400 East 47th Street in Chicago, Illinois. The store manager testified that he saw the defendant place \$29 worth of merchandise into a plastic bag and walk past the cashier toward the door and that he stopped the defendant as he was about to leave the premises without paying for the goods. He further testified that "Walgreen Drugs" was an Illinois corporation. The defendant testified that he was standing in line at the cashier's in "Walgreens" waiting to purchase cigarettes when Helen Williams asked him to hold a plastic bag while she made another purchase. He was still standing in line when he was stopped by the store manager.

The complaint filed against the defendant alleged "\*\*\*\*that Charles Jones has, on or about 20 April 71 at 400 E. 47th St. committed the offense of theft in that he knowingly obtained un-



authorized control over 9 windbreaker jackets of the value of \$29.00 the property of Walgreens Drug Store Inc. intending to deprive said Walgreens Drug Store permanently of the use and benefit of said property in violation of Chapter 38, Section 16-1A1 Illinois Revised Statute\*\*\*\*

In a prosecution for theft, the State must allege and prove the ownership of the stolen property in a person, corporation, or other entity capable of owning property, Section 16-1(a) (1) of the Criminal Code of 1961 (Ill.Rev.Stat.1969, Ch.38, par. 16-1(a)(1)). Where it is alleged that the owner is a corporation, the legal existence of the corporation is a material fact which must be proven. People v. Cohen, 352 Ill.380, 185 N.E.608, 88 A.L.R.481. Corporate existence may be shown (1) by the introduction of the corporate charter, (2) by proof of user, and (3) by testimony of a witness with knowledge of the fact. People v. McGuire, 35 Ill.2d 219, 220 N.E.2d 447.

The defendant initially argues that there is a patent ambiguity in the complaint in that at one point it alleges the owner as "Walgreens Drug Store Inc." while at another point it refers to the name as "Walgreens Drug Store." The shorter name which does not include the abbreviation "Inc." is preceded by the word "said" and it is clear from the context of the Complaint that the shorter form relates back to the first name set forth which alleges the corporate existence of the owner.

The defendant next points out that there is no corporation named "Walgreens Drug Stores Inc." registered to do business in Illinois and that the proper name of the corporation owning the drug store is "Walgreen Company." It is argued "Accordingly, it is perfectly clear that there is no corporation, recognized by the State of Illinois, that is capable of owning property by the name of 'Walgreens Drug Store Inc.' as alleged in the Complaint. The Complaint must then be construed to be defective."



There is case law which indicates that a complaint charging theft from a corporation must set forth the name of the corporation as given in its charter. See: Sykes v. People, 132 Ill.32, 23 N.E. 391. The trend, however, in recent cases in determining the adequacy of the allegations and the sufficiency of the proof of corporate existence and ownership has been to uphold those allegations and proofs which reasonably inform the accused of the offense charged and which, when viewed in the context of the entire record, protect him from a second prosecution for the same offense.

In People v. Whittaker, 45 Ill.2d 491, 259 N.E.2d 787, the defendant was charged with burglary of premises at a specified address which were occupied by the "Creve Coeur Manufacturing Company" and the "Juicemaster Manufacturing Company." On appeal, after conviction, the defendant contended (1) that the indictment was defective because it did not allege that the companies were corporations and (2) that he was not protected against a second prosecution for the same offense because the word "company" can be used to describe legal entities other than corporations. The Court recognized that in Wallace v. People, 63 Ill.451, an allegation of larceny from the "American Merchants' Union Express Company" was held insufficient without a further allegation that the company was a corporation; but the Court in Whittaker, nevertheless, held that the allegations of corporate existence were sufficient because they adequately informed the defendant of the charges against him and because it was clear from the indictment and record that the companies were corporations and accordingly that the defendant was protected against double jeopardy. As further evidence of the two companies corporate existence, the Court specifically referred to the Certified List of Domestic and Foreign Corporations, 1966, wherein at page 2421, the





corporate name of the "Juicemaster Manufacturing Company" was listed as "Juice-Master Manufacturing Co., Inc." The issue of a variance between the name given the corporation in its charter and the name alleged in the indictment was not raised in Whittaker, but the Court was aware of the variance and did not consider it plain error.

The complaint here fulfills the dual purposes of pleadings in criminal prosecutions. It adequately informs the defendant of the charges against him so that he can prepare his defense. He was arrested at the scene of the crime, and at trial he gave a full and complete testimony concerning the circumstances leading up to his arrest. The Complaint furthermore indicated that the owner of the stolen property was a corporation doing business as a drug store at 400 East 47th Street in the City of Chicago. At trial, the store manager testified that "Walgreen Drugs" was an Illinois Corporation. The defendant, in raising a plea of double jeopardy, in a subsequent prosecution, may have recourse not only to the complaint, but also to all other parts of the record. People v. Palmer, 4 Ill.App.3d 309, 280 N.E.2d 754. The record here although not using the actual corporate name of "Walgreen Company" establishes the identity of the owner of the property beyond doubt, and protects the defendant from a second prosecution for the same offense.

It is further argued that the testimony at trial that "Walgreen Drugs" was a corporation was inadequate to establish the corporate existence of "Walgreens Drug Stores Inc." This variance between the pleading and the proof is not fatal where no prejudice is shown and where as pointed out above the defendant was aware of the charges against him and the record protects him against a second prosecution. See: People v. Rogers, 16 Ill.2d 175, 157 N.E.



2d 28, People v. Palmer, 4 Ill.App.3d 309, 280 N.E.2d 794.

For the reasons stated, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

DIERINGER, P. J., and

ADESKO, J., concur.

(Abstract only)



STATE OF ILLINOIS  
—  
APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

PRESENT

— HONORABLE JAMES C. GRAYEN, — Presiding Judge  
— HONORABLE SAMUEL O. SMITH, — Judge  
— HONORABLE LELAND SIMKINS, — Judge

Attest: ROBERT L. CONN, Clerk.

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BE IT REMEMBERED, that to-wit: On the 30th day  
of August A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:

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STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

General No. 11550

Agenda 72-49

People of the State of Illinois,

Plaintiff-Appellee,

vs.

Donald Coggins,

Defendant-Appellant.

Appeal from  
Circuit Court  
Macon County

MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

The defendant appeals from a conviction and sentence for the offense of theft of property with a value in excess of \$150. He was sentenced to a term of not less than 2 nor more than 5 years in the Illinois State Penitentiary.

Upon this appeal the defendant asserts that he was represented by incompetent counsel at the jury trial and that he had an inadequate understanding of his rights against self-incrimination during custodial interrogation and finally that the sentence imposed was excessive.

Since there is no contention that the evidence is insufficient to convict beyond a reasonable doubt, we deem it unnecessary to detail the testimony and the evidence. Essentially, the evidence in this case is that in December of 1970 the defendant bought four coats and a hat for himself and three friends at a



store in Macon County known as Ray's Western Wear. Payment for this merchandise was by check upon a Decatur, Illinois bank which purported to be on a checking account of the defendant. The evidence is that the account had previously been closed and that the defendant had knowledge of the fact that the account was closed. The check was in the amount of \$254.65.

The three persons who were with the defendant at the time of the purchase testified; bank officials testified; the defendant's mother testified to the effect that he knew the account was closed. The owner of the establishment where the merchandise was purchased testified. The defendant testified and denied the sum and substance of the transaction.

As to the issue of incompetence of trial counsel, it is urged that counsel permitted the admission into evidence of prejudicial hearsay; that counsel had not adequately prepared for the trial of the case and failed to make timely motions to exclude incompetent evidence; and, finally, that counsel's inexperience left the prosecution virtually unopposed. There is little, if any, specification of trial proceedings to sustain the suggested conclusions. In People v. Logue (1970), 45 Ill.2d 170, 258 N.E.2d 323, the Illinois Supreme Court discussed the elements necessary to establish a constitutional inadequacy of representation by appointed counsel and stated that the defendant must demonstrate actual incompetence, substantial prejudice resulting therefrom, and further must establish that absent the incompetence, the



outcome would probably have been different. Our examination of this record persuades us that none of the indicated criteria enumerated in Logue are found here. The evidence of guilt in this case is overwhelming. The assertion that certain evidence may have been inadmissible is inadequate to establish that fact or the incompetence of counsel within the purview of Logue.

The defendant was interrogated by the police in Decatur, Illinois on the evening of December 31, 1970. It is here contended that the warnings given as required pursuant to the opinion in Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, were incomplete in that the defendant was not advised that once the interrogation began, he had a right to stop the questioning and request an attorney. In a hearing upon the issue of the voluntariness of the confession, the court received in evidence a custodial interview advice form and heard evidence from the interrogating officer. A motion to suppress the confession as not voluntary was denied. It was not suggested to the trial court that the Miranda warnings were inadequate nor was any ruling made thereon. The hearing in the trial court and the evidence adduced was directed at the issue as to the voluntariness of the statement of the defendant. In the absence of plain error depriving the defendant of substantial constitutional rights which probably would have affected the outcome, this court cannot and will not review assigned error that was neither presented to nor ruled upon by the trial court. Upon the facts of this case, there is no suggestion of deprivation of "fundamental fairness" nor room for invoking the doctrine of plain error.



Finally, the defendant urges that the sentence of not less than 2 nor more than 5 years was excessive. The defendant was 18 years of age at the time of the offense. He had one prior conviction for forgery. The trial court was fully informed as to the defendant's history and background and we find no basis in this record to exercise the authority granted the appellate courts under Supreme Court Rule 615 to modify the sentence. The judgment and sentence of the circuit court of Macon County should be and are affirmed.

JUDGMENT AFFIRMED.

SMITH and SIMKINS, JJ, concur.





State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice  
Honorable THOMAS J. MORAN, Justice  
Honorable MEL ABRAHAMSON, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

September 11, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FILED

SEP 11 1972  
HOWARD K. KELLETT, Clerk  
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the Eighteenth
v.	)	Judicial Circuit, DuPage
	)	County, Illinois.
ROBERT WRIGHT,	)	
	)	
Defendant-Appellant.	)	

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

A three count indictment charged the defendant with burglary, aggravated battery and aggravated assault. A negotiated plea of guilty to the charge of burglary was entered and the defendant was sentenced in conformance with the plea agreement. Before execution of the penalty, the defendant moved to vacate his plea; the motion was denied and defendant appeals.

The single issue raised is that the trial court erred in summarily denying, without a hearing, the defendant's motion to vacate his plea.

Before accepting the plea, the trial court gave the defendant a detailed, comprehensive admonishment in accordance with Supreme Court Rule 402. At the request of the defendant, the execution of the sentence was stayed for two weeks.



Upon his surrender, defendant's attorney moved to vacate the plea of guilty and stated that the defendant himself would explain his reasons to the court.

The following colloquy appears:

" Defendant: I just don't see how I've been convicted, your Honor, to be honest. What more can I say? Legally, and under the laws I am protected by, I just can't see it.

Court: Well, Mr. Wright, you pleaded guilty.

Defendant: I realize that.

Court: You not only pleaded guilty, but you were advised of all your rights. You told the Court you were guilty because you actually did what each count of the indictment charged you with doing.

Mr. Bruun (prosecutor): It was Count I, your Honor.

Court: Or Count I of the indictment charged you with doing. You pleaded guilty because you were guilty, and now you say you can't be convicted?

Defendant: I can't understand it, your Honor. By the laws that protect us, I can't see it.

Court: The motion is denied. Take him down to jail to start serving the sentence."

The totality of defendant's argument on appeal follows:

" The defendant should have been given a hearing to probe his lack of comprehension of the situation. From this record, and from our position as lawyers, his comments appear senseless -- and it is for this very reason, that a few minutes should have been spent to ascertain if any misapprehension of facts, key misrepresentations, or unarticulated defenses existed. A hearing might also have led to the need for a competency hearing as ordered by Ill. Rev. Stats., Chap. 38, sec. 104-1 for certainly a lack of understanding of the 'nature and purpose of the proceedings against him' is evident. "

We find no basis or merit in defendant's claim for reversal and, therefore, affirm the judgment appealed.

Judgement affirmed.

ABRAHAMSON and GUILD, J.J. - Concur





7 I.A. 312

71-381

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On September 7, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



Abstract

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
v. )  
RICHARD PEASLEE, )  
 )  
Defendant-Appellant. )

Appeal from the Circuit  
Court of the 19th Judicial  
Circuit, McHenry County.

HOWARD K. WELLET, Clerk  
Circuit Court, 24 Dec.

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

In November, 1968 defendant, represented by the assistant public defender, Theodore Floro, pleaded guilty to a charge of burglary; a second charge of aggravated battery was dismissed. In February, 1969, following a hearing in aggravation and mitigation, defendant was sentenced to a term of not less than three nor more than six years in the penitentiary. No appeal was taken.

On June 29, 1970 defendant filed a post conviction petition pro se alleging that he had been induced to plead guilty by a promise of probation made by his attorney, and that he was prejudiced by the court's reliance on a statement in the probation report as to "previous convictions" of defendant in Wisconsin "which petitioner has been acquitted of." Upon the filing of that petition the court appointed counsel to represent defendant. His counsel, by leave of court, amended defendant's petition, adding a further allegation that the inclusion in the probation report of references to "convictions", which were not in fact convictions, prejudiced defendant because they "could have or did result in an excessive sentence." At the conclusion of the hearing the judge denied the petition.



On appeal therefrom defendant urges that he was denied a fair hearing because the trial judge did not recuse himself sua sponte from presiding at the hearing on defendant's post conviction petition as he should have done. At no time did defendant move for a substitution of judges as he was permitted to do or make any motion or voice any objection to seek a disqualification of the judge on any ground. Having failed to do so, defendant may not raise the point for the first time on appeal (People v. Wells 393 Ill. 626, 627-628) and therefore is deemed to have waived such right. People v. Lawrence, 29 Ill.2d 426, 427-428; People v. Cazaux, 119 Ill.App.2d 11, 17.

People v. Wilson, 37 Ill.2d 617, cited by defendant, is not applicable. There the post conviction petition itself made charges as to the trial judge's promises and threats and when the petition was assigned for hearing to the same judge who presided at the trial, defendant promptly filed a petition for a change of venue. No such petition was filed in the case at bar; and there was no charge in the petition and no evidence of any bias on the part of the trial judge.

The defendant contends in his brief that the judge was "a potential witness" but at no time did defendant nor his counsel make such a statement during the hearing or request that the trial judge appear as a witness. Defendant's contention is entirely without merit.

The Illinois Supreme Court stated in People v. Mamolella, 42 Ill.2d 69, 73, that "(i)n the absence of a showing that defendant would be substantially prejudiced, the post-conviction petition should be heard by the same judge who rendered the original judgment." There has been no showing here of any prejudice to this defendant in the conduct of the hearing on



his petition and he was afforded by the trial judge all the rights to which he was entitled.

Defendant further contends that the court erred in admitting in evidence at the hearing two letters from defendant to Mr. Floro written in April and May, 1969 (two and three months after his conviction) asking for legal services; he urges that these letters should have been excluded as privileged communications between lawyer and client and that Mr. Floro was still defendant's attorney.

At the hearing defendant testified to a conversation with Mr. Floro during a recess in the proceedings at which time Mr. Floro told him that if he wanted probation he would have to "go along with the court." Mr. Floro testified that he made no such promises. The only relevant purport of the letters from defendant to Mr. Floro is that defendant made no reference in them to any promise of probation by Mr. Floro. (It may be noted in this connection that there was no charge by defendant of any such promise having induced his guilty plea either in a petition he filed in May, 1969 for a reduction of sentence, or in a written request by him in February, 1970 for the transcript of proceedings and common law record.)

Defendant having voluntarily testified to confidential communications between himself and his attorney concerning probation waived the privilege. In People v. Gerold, 265 Ill. 448, 481, the Illinois Supreme Court said:

"While the general rule is that all confidential communications between attorney and client made because of their relationship and concerning the subject matter of the attorney's employment are privileged from disclosure, and counsel are not at liberty, even if they wish, to testify concerning them, (citations) yet the client himself can waive such privilege, and does do so where he voluntarily testified himself to confidential communications between himself and his attorney."





Not only was the testimony of Mr. Floro, his former attorney, concerning the conversation with the defendant admissible, but so were defendant's letters to Mr. Floro. See also Turner v. Black, 19 Ill.2d 296, 309.

No error having been committed, the judgment is affirmed.

Judgment affirmed.

SEIDENFELD, P.J., and GUILD, J., concur.



71-183

## UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

September 12, 1972 the Opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

*Abstract*  
**FILED**

SEP 18 1972  
HOWARD K. KELLETT, Clerk  
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	Appeal from the Circuit
v.	)	Court of the 17th Judicial
	)	Circuit, Winnebago County.
DAVID CHARLES McCRAV,	)	
	)	
Defendant-Appellant.	)	

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

The defendant was convicted of armed robbery and attempted murder in a bench trial and was sentenced to a term of five to twenty years in the penitentiary on each charge, both sentences to run concurrently. He appeals on the ground that the indictment as to both counts should have been dismissed because he was not placed on trial within 120 days from the time of his arrest in accordance with Section 103-5 of the Code of Criminal Procedure. Ill.Rev.Stat. 1969, ch. 38, sec. 103-5.

The defendant was charged with both counts and taken into custody on September 19, 1970. He was indicted by the grand jury on October 14 and at his arraignment the case was set for trial on November 16. On November 13 his counsel moved to withdraw; the public defender was appointed to represent the defendant and obtained a continuance of the trial date to November 23 in order to prepare for trial.

This court in People v. Taylor, 123 Ill.App.2d 430, observed that courts have interpreted the 120-day statute on numerous occasions. In that case we held (at page 433) that the statute is tolled if the defendant seeks and obtains a continuance, and that the new 120-day period starts to run from the date the delay





occurs or to which the case is continued. We cited many authorities making that interpretation.

Thus, in the case at bar a new 120-day period started to run on November 23, 1970, the date to which the case was continued at defendant's request. The bench trial took place on February 3, 1971, which was within the statutory period.

The judgment of the trial court is affirmed.

Judgment affirmed.

SEIDENFELD, P.J., and GUILD, J., concur.



7 I.A. 380

71-189

UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On September 7, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



1920  
HOWARD W. ELLETT, Clerk  
 U.S. Court, 2d District

G. DALE VAN LEEUWEN & SONS, )  
INCORPORATED, Plaintiff-Appellee, )  
and Cross-Appellant. )  
v. ) Appeal from Circuit Court  
of the 18th Judicial  
Circuit, DuPage County,  
Illinois.  
KAUFMAN AND BROAD HOMES, INC., )  
and YORK PROPERTIES, INC., )  
Defendants-Appellants. )

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

This appeal arises from a judgment for \$19,301.51 entered in favor of the plaintiff, a subcontractor, against the owner of certain real estate and against the contractor, and from the dismissal of defendant's <sup>Counter</sup> claim of \$24,318.59 against the plaintiff. Plaintiff cross appeals as to the adequacy of the amount awarded.

In August 1966 plaintiff entered into a subcontract with Kaufman and Broad Homes, Inc. ("K & B"), as contractor, to perform "basement excavating, foundation backfill, hauling and spreading of black dirt" at the rates therein specified in connection with a project for defendant-owner York Properties, Inc. ("York") for the construction of "Brandywine Towne Houses, Danby Subdivision III" in DuPage County, Illinois. Plaintiff proceeded with the job until various disagreements arose between plaintiff and K & B as to performance under the contract by both contracting parties. On June 8, 1967 plaintiff served notice on York of its claim for lien, and on August 31, 1967 recorded its claim for lien with the Recorder of Deeds of DuPage County.

In due time plaintiff filed its complaint against K & B and York which, as amended, consisted of five counts. Counts I,



III, IV and V alleged the written contract above referred to the performance of services by plaintiff, the service of the notice of lien on York and the recordation of plaintiff's claim for lien on the real estate in question, and demanded judgment against York and K & B for services performed by plaintiff on the project as follows:

COUNT I--\$11,949.22 for invoice jobs and retainages due plaintiffs;

COUNT III--\$3,000 for removal of 5,000 cubic yards of clay from various locations;

COUNT IV--\$1,245 for recutting sidewalks in various parts of the area;

COUNT V--\$4,725 for leveling and grading top soil of certain areas designated as "common lands".

The aggregate amount demanded was \$20,909.22. Count II was an alternative to Count I, and no questions are raised in this appeal by reason of its dismissal by the trial court.

After an extended bench trial the court found the issues for the plaintiff on Count I (Except as to certain set-offs), and on Counts III and IV, dismissed Counts II and V, and dismissed defendants' counter-claim.

The court then entered judgment accordingly against defendants in favor of the plaintiff for \$19,301.51 and costs. The judgment represented \$15,286.30 to plaintiff under Counts I, III, and IV, and included interest on certain of the amounts from May 31, 1967 to the date of judgment, and \$1,528.63 for what the court found was <sup>it</sup> a fair and reasonable value of plaintiff's attorney's fees. (The subcontract contained a provision for an award of attorney's fees to the prevailing party in the event of a controversy decided by court action.)

Defendants contend that the trial court's findings in favor of plaintiff, both on the suit and counter-claim, were





contrary to the manifest weight of the evidence, and that the trial court's conduct during examination and cross-examination of witnesses was prejudicial to defendant's right to a fair trial. Plaintiff, in its cross appeal, contends that the court erred: (1) in reducing the award under Count I from \$11,942.22 to \$11,051.33 (a reduction of \$890.89); (2) in dismissing Count V; (3) in making an inadequate allowance of interest;<sup>and</sup> (4) in making an inadequate award for plaintiff's attorney's fees.

One of the principal controversies between the parties concerned the area to be covered by the subcontract, that is, whether "Danby Subdivision III" covered only a tract of 90 units, which later became known as "Danby Subdivision Unit 3, South," or whether it also covered "Danby Subdivision Unit 3, North" and Danby Subdivision Unit 3, West". Plaintiff contends that it only covered the 90 unit tract later known as "Danby Subdivision 3, South". Defendants contend that it covered all three contiguous tracts, and that because of plaintiff's failure to complete his subcontract on all three tracts, it was necessary to engage other subcontractors to do so on a "time and material" basis.

The evidence discloses that at the time of the execution of the subcontract the only plat of the subdivision was designated as "Danby South, Unit III", which was recorded in the office of the Recorder of Deeds of DuPage County on September 16, 1966 (a few weeks later), and described only the 90 unit tract which later became known as "Danby III, South". The defendants' "Bid Invitation, Instructions to Bidders, Etc." for "Utility Improvements in Danby Subdivision Unit No. 3", which was submitted to plaintiff and other bidders, supplied under the heading "Quantity Takeoff" computations which related to 90 units only. Plaintiff contends that, while beginning in December 1966 and ending in January 1967,



it performed excavation and other services in the "North tract" at the contract rates, he was not obligated to do so under the subcontract.

The court found from the evidence that "(t)here was a meeting of the minds of the parties hereto only to the south 90 of Danby 3," and that any work done by plaintiff "outside of that did not bind the contractor to any more than he did \* \* \*." A careful search of the record discloses that the court's finding was not against the manifest weight of the evidence.

There was also conflicting testimony as to whether plaintiff had "spread top soil to a 4" minimum thickness" and whether plaintiff "finish graded" to insure proper drainage to the street and to accommodate landscaping with a minimum of hand work as he was required to do under his subcontract. The trial court found that plaintiff had finish graded as required, and that the services performed by Midwest Nurseries, one of the other subcontractors hired by defendant K & B, were by and large those to be performed by a landscaper. The court's finding has adequate support in this record.

In their brief defendants acknowledge that the charges in Count I "were by and large uncontested and were supported by signed work tickets." In finding for the plaintiff on this count the court disallowed an invoice of the plaintiff in the sum of \$363.99 for hauling spoil to a slough which the court found to be plaintiff's contractual obligation and "not chargeable to the prime contractor"; and deducted as a set-off the sum of \$533.90 that K & B paid to another subcontractor for spreading black dirt on common lands which plaintiff should have performed under his contract. In allowing the set-off of \$533.90, the court observed that where the contract is on a "unit basis" and there is common ground, the common ground is "incorporated into a pro rata charge-off



on the basic contract." We find no error in the allowance of the set-off and in the disallowance of plaintiff's invoice for hauling spoil.

As to Count III the evidence showed that plaintiff removed 5,000 cubic yards of spoil piled against various buildings and in various places on Danby 3, and that the reasonable value of those services was \$3,000. Plaintiff testified that this was done in April 1967 and that these accumulations of dirt and spoil resulted from snow removal operations of the previous hard winter and from excavations by other contractors to install sewer, water, gas and electric lines; that K & B's agent directed plaintiff to remove the dirt and clay, and while the agent stated that he could not authorize payment, "we would have a settlement" at the end of the job.

As to Count IV plaintiff's testimony is that it was directed by defendants to recut additional sidewalks and to reshape the land to accommodate the change, because after plaintiff had cut the sidewalks according to the original plans it became apparent that such plans had to be redesigned; that K & B directed plaintiff to install patios on some 10 units and that a reasonable charge for all of these services <sup>was</sup> of \$1,235.

As to both Counts III and IV defendants rely on a provision in the contract which states, in substance, that payment will not be made for work not covered by the contract unless a signed work order is obtained prior to the start of the work. In its oral opinion the court found under both counts that the work performed by the plaintiff had been ordered and accepted by the defendants and allowed \$3,000 and \$1,235, respectively, to the plaintiffs. It is apparent that K & B by ordering these extras waived the condition of the contract, and by its own acts



became liable to pay therefor. See Theis v. Svoboda (1911), 166 Ill.App. 20, 23; Keim Builders, Inc. v. Webb (1971), 1 Ill. App.3d 375; and Ed Keim Builders, Inc. v. Hartley (1971), \_\_\_ Ill.App. \_\_\_d \_\_\_, 268 N.E.2d 49, 52.

The trial court properly dismissed Count V, which was also an "extra". Plaintiff was informed by K & B's agent that payment would not be authorized for this work.

Plaintiff contends that the court erred in not allowing interest on the amounts aggregating \$4,235 allowed under Counts III and IV, thus depriving it of \$942.88 in additional interest. This contention was not raised in the trial court and cannot be raised for the first time on appeal. (In Re Petition to Annex Territory, 1 Ill.App.3d 773, 777.) In any case, the contention is without merit.

Finally, plaintiff contends that the allowance of attorney's fees was inadequate. The only case cited by plaintiff is Golstein v. Handley, 390 Ill. 118, 125, where the court stated: "The amount to be allowed for attorneys' fees is so far in the discretion of the chancellor that in the absence of a clear abuse of that discretion, this court will not interfere." We find no abuse in the court's discretion in the allowance made.

As indicated above the trial was quite extended and the trial judge heard much testimony and was confronted with numerous exhibits. In Ed Keim Builders, Inc. v. Hartley, supra, this court stated at page 53:

"A reviewing court will not upset the trial court's award of damages where the evidence is conflicting, where there is evidence to support the verdict and where there is no indication that the award is the result of passion, prejudice or corruption. Landolt v. Stratmann, 87 Ill.App.2d 81 (1967). This is so even where the reviewing court would have been better satisfied with a different finding \* \* \*. The trial judge was present to hear and evaluate the testimony and his judgment should be reversed only if contrary to the manifest weight of the evidence."

(See also Schulenburg v. Signatrol, Inc. (1967), 37 Ill.2d 352, 356.) Since it does not appear from the record that the judgment







is clearly wrong, it must be affirmed.

Judgment affirmed.

SEIDENFELD, P. J. and GUILD, J., concur.



7 I.A. 3 417

71-383

UNITED STATES OF AMERICA

ABST.

State of Illinois )  
Appellate Court ) ss: .  
Second District )

At a session of the Appellate Court, begun and held at  
Elgin, on the 6th day of December, in the year of our Lord  
one thousand nine hundred and seventy-one, within and for the  
Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice  
Honorable THOMAS J. MORAN, Justice  
Honorable MEL ABRAHAMSON, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On  
September 12, 1972 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FILED

SEP 12 1972

HOWARD K. KELLETT, Clerk  
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

TERRY LEE WOOLUMS,

Defendant-Appellant.

)  
)  
) Appeal from the Circuit Court  
) for the 17th Judicial Circuit,  
) Winnebago County, Illinois,  
) Criminal Division.  
)  
)  
)

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Defendant pled guilty to two counts of forgery and was sentenced for a term of one to two years in the penitentiary. His appeal to the Supreme Court was transferred to this Court.

Defendant raises the sole issue of whether he expressly and understandingly waived his constitutional right to a trial by jury. A review of the transcript of proceedings reveals that defendant received no admonishment by the court regarding his right to trial by jury or any of the other rights expressly stated in Supreme Court Rule 402. (Ill. Rev. Stat. 1971, ch. 110A, sec. 402) We, therefore, reverse the judgment of conviction and remand the cause with directions to vacate the plea of guilty and rearraign the defendant.

Judgment reversed; cause remanded with directions.

ABRAHAMSON and GUILD, J.J. - Concur.



## UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss: .  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice  
Honorable THOMAS J. MORAN, Justice  
Honorable MEL ABRAHAMSON, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

September 12, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FILED

SEP 12 1972

HOWARD K. KELLETT, Clerk  
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court
	)	of the Eighteenth Judicial
v.	)	Circuit, DuPage County,
	)	Illinois.
JOHN R. SHIELDS,	)	
	)	
Defendant-Appellant.	)	

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

A two count indictment charged the defendant with burglary and theft. Under plea negotiations he entered a plea of guilty to count 1(burglary) and was sentenced from 1 to 2 years, the sentence to run consecutively with another sentence already imposed under unrelated offenses committed in another county.

Pending appeal, the defendant's attorney has filed a motion to withdraw as counsel claiming the appeal to be frivolous.

We have followed the dictates of Anders v. California, 386 US 738. The appeal has been considered on the basis of the record, counsel's motion with accompanying brief and the defendant's letter of April 15, 1972. The record discloses no error.

Therefore, the motion to withdraw is allowed and the judgment is affirmed.

Motion allowed; Judgment affirmed.

ABRAHAMSON and GUILD, J.J. - Concur.



## UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable THOMAS J. MORAN, Justice  
-- Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

September 19, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



that the plea was induced by a misrepresentation of counsel; whether defendant should have been allowed to enter a plea of guilty to the charge of voluntary manslaughter on a one-count indictment charging murder only; and whether the sentence was excessive.

In 1967 when this plea was entered, the court was not required to make specific inquiry as to whether the plea was understandingly and voluntarily entered, or to inquire as to the factual basis for the plea. People v. Nardi, 48 Ill.2d 111, 115-116 (1971). The record shows compliance with Ill.Rev.Stat. 1967, ch.38,sec.115-2; and ch.110A,sec.401(b), then in effect.

The defendant has not met his burden of proving that the court below committed manifest error in ruling that the defendant was not induced to plead by misrepresentation of counsel that he would receive a sentence not to exceed five years. The defendant's counsel testified that no such representation was made; the State's Attorney testified that no representation as to sentence was made by him to anyone; and the record shows that the court admonished defendant that he could receive a sentence of 1-20 years on a plea of guilty. For more than two years after he pleaded guilty, the defendant made no claim that there had been an unfulfilled promise. The only evidence that the promise of a lesser sentence was made consisted of the testimony of defendant and members of his family. The credibility of the witnesses was for the trial court and the record supports its resolution of the conflicting evidence. People v. Moore, 42 Ill.2d 73, 80 (1969); People v. Burton, 46 Ill.2d 135, 141 (1970).

No error was committed in allowing defendant to plead to voluntary manslaughter on the one-count indictment charging murder, since the plea was to a lesser included charge. People v. Carpenter, 1 Ill.2d 347, 349 (1953).



The sentence is not excessive in view of the entire record.

The motion of the defender for leave to withdraw is granted.  
The order of the trial court denying the post conviction petition  
is affirmed.

Affirmed.

Thomas J.  
/MORAN and GUILD, J.J. Concur.





7 I.A.<sup>3</sup> 432

72-68

STATE OF ILLINOIS

PEOPLE VS. DAVID PULLEY



ABST.

APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at  
Ottawa, on the 1st Day of January in the Year of our Lord  
one thousand nine hundred and seventy-two, within and  
for the Third District of Illinois:

Present—+ PC

HONORABLE ALLAN L. STODER, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on  
SEPTEMBER 19, 1972

the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the  
words and figures following, viz:



No. 72-68

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In The  
APPELLATE COURT OF ILLINOIS  
Third District  
A. D. 1972.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Will County.
	)	_____
vs.	)	
	)	Honorable
DAVID PULLEY,	)	Michael Orenic
	)	Presiding Judge.
Defendant-Appellant.	)	

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PER CURIAM

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Abstract

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Defendant David Pulley was indicted for the crime of Escape in March 1971. In the indictment it was charged that David Pulley had, while under indictment for attempted murder and armed robbery, intentionally escaped from the custody of the deputy sheriff of Will County. On April 30, 1971, defendant was convicted of attempted murder. On June 4, 1971, defendant tendered a plea of guilty to escape. The plea of guilty to escape was negotiated, and the court, after hearing the terms agreed upon, stated that the court would act on the basis of the agreement, and after admonition to defendant in accordance with Rule 402(a), the court determined that the plea was voluntary and determined that there was a factual basis for the plea. The court then accepted the plea of guilty. In accordance with the terms of the plea bargain, the trial judge sentenced defendant to a term of from two (2) to five (5) years for escape to be served consecutively to the sentence imposed for the crime of attempted murder.



On June 23, 1971, a notice of appeal was filed with the Circuit Clerk of Will County and the Illinois Defender Project was appointed as counsel on appeal by the trial judge.

The motion for leave to withdraw and the brief in support thereof were filed in accordance with the directions contained in ANDERS v. CALIFORNIA, 386 U.S. 738. It was indicated by counsel that after careful examination of the record, appointed counsel concluded that an appeal would be wholly frivolous and could not possibly be successful. We have, therefore, examined the record completely in this cause.

As we have indicated, the court determined that defendant had heard the terms of the plea agreement and that the terms were satisfactory and agreeable to him. The court stated its intention to honor the terms of the agreement and there was compliance therewith. There was also compliance with Supreme Court Rule 402. The court determined that the plea was voluntary and not the product of any promise or threat not stated already in the record. The trial court explained in detail the elements of escape by illustration and by referring to the facts in the case. The judge also recited the minimum and maximum sentences and gave an example to illustrate what kind of sentence might result. The judge also explained to defendant that by pleading guilty he was waiving his right to a jury trial, the right to be confronted by witnesses against him, and that he could plead not guilty, if he so desired. The State's Attorney also stated the facts which were the basis of the charge. The sentence was within the limits agreed upon by defendant and the lawyers. This Court has uniformly refused to disturb a sentence which results from negotiation (PEOPLE v. CURTIS, \_\_\_\_\_ Ill. App. 3d \_\_\_\_\_, 277 N.E. 2d 352), and it is also true that a court on review will not modify



a sentence simply because of the background or youth of a defendant (PEOPLE v. LEGGETT, 2 Ill. App. 3d 692, 275 N.E.2d 651). This Court agrees that there would be no likelihood that a sentence reduction argument would be successful in this case.

After careful examination of the record, therefore, we agree that all of the proceedings had were in accordance with the appropriate procedural rules prescribed in this State and agree with counsel appointed for defendant that there is no reversible error which could be raised and that an appeal in this case would, therefore, be wholly frivolous. For the reasons stated we have heretofore entered an order granting said counsel leave to withdraw, and, upon review of this cause, we find that the judgment of the Circuit Court of Will County should be and is, therefore, affirmed.

Affirmed.





## STATE OF ILLINOIS

## APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE DELAND SIMKINS, Judge

Attest: ROBERT J. CONN, Clerk.

---

BE IT REMEMBERED, that to-wit: On the 13TH day  
of September A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



FOURTH DISTRICT

Agenda 72-'75

Defendant-Appellant.

Appeal from  
Circuit Court  
Macon County

The facts in this case indicate that in July of 1970 defendant was at the home of a Charles Young in Decatur, Illinois, where a group of people were playing a card game referred to as "skin" for money as stakes. The evidence is that the defendant was present for awhile, then left, and then returned to the Young home.



Although there is some conflict in the testimony as to the events immediately preceding the shooting, the evidence indicates so far as the prosecution witnesses are concerned, that upon the defendant's return to the Young home, he was wielding a gun when he entered the house. This testimony showed that the defendant entered a small bedroom adjacent to the dining room. Timothy Young, Charles Young, and a W. C. Emerson were sitting on a bed in this bedroom drinking a half pint of whiskey. The defendant entered the room, and a conversation began between the defendant and Emerson with reference to the sum of \$8 allegedly owed by Emerson to the defendant. This money was apparently turned over to the defendant by the deceased. Some of the testimony indicated that Timothy Young had no gun at this point. However, one witness who was playing cards in the living room said that Timothy had a gun in his back pocket. Another witness testified that when Davies shot the first time, Timothy had his hand in his back pocket. Defendant is said to have backed out of the bedroom toward the front porch. Charles Young moved between the defendant and Timothy Young.

Defendant in his testimony indicated that upon his arrival he did have a loaded .38 calibre pistol tucked in his belt with his shirt on the outside of his pants. He proceeded to request that Emerson pay him the \$8 indebtedness but he did so in a friendly manner. Timothy Young then entered into the conversation, called the defendant some names, and then lunged



over Charles Young's shoulder and pointed or planted a gun against the left side of defendant's nose. Defendant said he heard the weapon click after which he brought up both of his hands in an effort to divert Timothy's aim. At that point, the defendant fired his weapon twice. Timothy Young was killed by one of the bullets fired from the defendant's gun. The defendant then called for someone to phone for the police and for an ambulance.

A .25 calibre automatic pistol belonging to decedent was found on the porch by police officers when they arrived. Defendant turned over his weapon to the police voluntarily.

A crime laboratory technician testified concerning the Exhibits 1 and 7, a spent cartridge, a particle of lead and a .38 calibre Rome revolver belonging to the defendant. He also testified about Exhibit 2 which was the decedent's semi-automatic pistol which contained a clip with five rounds of ammunition and one loose round of ammunition. The expert tested the decedent's gun and stated that it did misfire once in twelve shots (on the sixth shot). He also examined the loose cartridges and found that one round of ammunition had a slight indentation in it. As to whether he could form an opinion as to the possible malfunctioning of one of the shells, he stated that this could not be determined. He could not say which cartridge was in the chamber of decedent's gun at the time of the incident but did note that the indentation on the bullet could have been caused by the firing pin striking it.





Mrs. Davies, the estranged wife of the defendant, testified for the defense, stating that the defendant left with a gun on the morning of the incident in order to take it to an Arthur Smith's house in order to pawn it. On rebuttal, the prosecution called Arthur Smith who admitted that the defendant had been to his house on the day of the shooting, but had made no mention of any gun.

Upon this appeal from the conviction, the defendant asserts many issues for review. The defendant contends that the evidence was insufficient to prove the crime of involuntary manslaughter beyond a reasonable doubt; that the method of jury selection amounted to a systematic and deliberate exclusion of blacks; that the Decatur Police Department "bungled" in the handling of evidence, and that such amounts to a violation of defendant's right to due process; and, finally, that the trial court erred in denying the defendant's motion for probation.

The issue sought to be raised in the trial court, and here, alleging the systematic and deliberate exclusion of blacks from the jury is in our view disposed of by the opinion of our Supreme Court in People v. Cross, 40 Ill.2d 85, 237 N.E.2d 437. Here, as there, the only matter relating to systematic and deliberate exclusion was the mere assertion of that fact. Such is not sufficient to establish a prima facie case of systematic and deliberate exclusion requiring proof by the State which would negate purposeful discrimination. See also People v. Petty, 3 Ill.App.3d 951, 279 N.E.2d 509.



We turn now to the defendant's contention that the "bungling of the police" in failing to mark the order of the bullets removed from the decedent's gun amounted to a violation of the defendant's right to due process of law. The testimony of two witnesses, detectives Butts and Sexton, indicated that they disarmed the weapon at the police headquarters and unloaded the cartridge, placing the items in an envelope bag. There was one cartridge in the chamber and one in the clip but no effort was made to distinguish between the two at that time. The defendant gave the officers an oral statement but he did not mention the misfiring of the decedent's gun in that statement. Another witness, a detective Davis, who had taken the written statement from the defendant, testified that the defendant had never mentioned a misfire. The defendant's assertion that "bungling" deprived him of due process finds no support in this record. The officers who are accused of bungling were not specifically alerted to the possibility of a misfire and there is no reasonable basis asserted by the facts of this case to make the identification of the cartridge in the chamber or in the clip meaningful as of the time the weapon was disarmed.

Turning now to a consideration of the defendant's assertion that the evidence was insufficient to prove guilt beyond a reasonable doubt, we note from the summary of the evidence that we have recited that defendant's account of the events leading up to the shooting differed substantially from the testimony presented



by the prosecution through its several witnesses. The defendant's reliance upon the defense of self-defense and the credibility of the witnesses and the option to believe one version or the other was for the trier of fact. As we noted in People v. Rodgers (1971), 2 Ill.App.3d 507, 276 N.E.2d 504, the trier of fact could determine whether the defendant's action was likely to cause death or great bodily harm and whether his conduct constituted a gross deviation from the standard of care which a reasonable person would exercise in the particular factual situation. Our review of this record leads us to the view that the jury could determine the defendant's conduct was such that the death of Timothy Young was involuntary manslaughter. Certainly there is no absence of evidence sufficient to convict beyond a reasonable doubt.

We find no abuse of discretion in the denial of probation. The defendant's prior record shows that he had plead guilty in 1962 to a forgery charge upon which he was sentenced to a term of 1-5 years in an Indiana institution. He also had a prior conviction for grand larceny in 1948 for which he was given a penitentiary sentence. The offense here involved and the background of the defendant shown by this record does not suggest the trial court in any way abused his discretion in denial of probation.

The judgment of the circuit court of Macon County is affirmed.

JUDGMENT AFFIRMED.

SMITH and SIMKINS, JJ, concur.



17 I.A.<sup>3</sup> 449

71-124

STATE OF ILLINOIS

W. K. GIROUX VS. MERLIN KARLOCK



ABST.

APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at  
Ottawa, on the 1st Day of January in the Year of our Lord  
one thousand nine hundred and seventy-two, within and  
for the Third District of Illinois:

Present—

\* HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE WALTER DIXON, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on  
SEPTEMBER 19, 1972

\_\_\_\_\_ the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the  
words and figures following, viz:





In The  
APPELLATE COURT OF ILLINOIS  
Third District  
A. D. 1972.

W. K. GIROUX,	)	Appeal from the
	)	Circuit Court of
Claimant-Appellant,	)	Kankakee County
	)	
vs.	)	
	)	Honorable
MERLIN KARLOCK, Executor of	)	Victor N. Cardosi
the Estate of Everett Madison,	)	Judge Presiding
deceased,	)	
	)	
Respondent-Appellee.	)	

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ALLOY, J.

Abstract

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This is an appeal from an order of the Circuit Court of Kankakee County granting a summary judgment for the executor of the estate of Everett Madison, deceased, disallowing a probate claim filed by W. K. Giroux. The decedent, Everett Madison, died on June 19, 1968, and Merlin Karlock was appointed executor of his estate.

It appears from the record that on August 21, 1968, W. K. Giroux, generally hereinafter referred to as "claimant", filed a claim in the probate proceedings referred to for the sum of \$170,859.09 which he asserted represented principal and interest purportedly due and owing on a demand and judgment note of \$78,000 signed by decedent and dated May 21, 1951. The executor filed a sworn answer denying the material allegations of the claim and affirmatively alleged among other things



that the claim was barred by the statute of limitations, and that the decedent had, on various occasions subsequent to the date of the note, acknowledged that it had been paid or settled by the parties thereto.

It was expressly stated and shown by exhibits appended to the answer that the executor's claim of payment or settlement was based on the following: (a) an account stated executed by the claimant on December 26, 1952, in which he acknowledged that he was indebted to the decedent for the sum of \$35,320 as evidenced by a note of the same date, and in which the claimant declared that he held all of his property in trust for the decedent until such time as the note was paid and further provided that after the note had been paid, one-half of claimant's property would belong to the decedent; (b) the circumstance that claimant failed to list the note of decedent as an asset in the bankruptcy proceeding which had been initiated against the claimant by a creditor in 1953; (c) that claimant in the same bankruptcy proceeding filed an answer under oath wherein he alleged that he was insolvent on June 3, 1953; (d) that in a 1968 court proceeding to discover assets, which took place but months before decedent's death, claimant stated under oath that he had no assets; and (e) that decedent on various occasions between 1951 and 1966, had in fact loaned substantial sums of money to claimant.

After discovery proceedings, the executor filed a motion for summary judgment, which, as amended, relied upon the facts and theories of his answer as a basis for such relief. Claimant filed a response in opposition to the motion, and submitted therewith his own affidavit and a discovery deposition taken from him in the case. The affidavit, in substance, set forth that decedent had executed the claim note, that claimant had delivered to decedent cash and checks totaling the amount of the note, and that decedent



had made payments on the note at times and in amounts as indicated in the claim. Endorsements on the note, in the handwriting of claimant only, purport to show payments as follows: April 6, 1954 - \$1,000; September 8, 1956 - \$700; May 2, 1961 - \$500; April 8, 1964 - \$2,500; July 12, 1964 - \$1,000; and August 3, 1964 - \$1,500. Claimant in his affidavit acknowledged that he had signed the "account stated" on December 26, 1952, but denied that decedent Madison had in fact loaned him \$35,320, and stated that he had signed the account stated after legal counsel had explained to him that it "was only a technicality", and designed for the "protection" of the claimant.

It appears from claimant's deposition that he was approximately 35 years old on March 21, 1951, when the claim note was dated, and that the decedent was almost 30 years his senior. Decedent was a cattle buyer and presumed to be a millionaire. Claimant had graduated from high school, had worked as a helper on a truck, and had been in the military service as a pilot from 1942 to 1947. Following his separation from the military service, he went to work as a car salesman for a dealer in Momence, Illinois, and later in 1947, purchased a site under contract for deed and went into the used car business on his own. He paid \$19,000 for this location and said that he paid off the contract for deed between the years 1947 and 1953.

Claimant stated that he had known the decedent when claimant was a boy, when decedent came to the farm of claimant's father to purchase cattle. He stated that his sole relationship with decedent between 1947 and 1950 occurred when he piloted the decedent or his wife on various trips. He at first stated that he had no other business dealings with the decedent until 1953, but later stated that he and decedent had invested



some money in an oil field venture in 1949 or 1950, when claimant, according to his testimony, invested \$20,000. Later, claimant further corrected his testimony to state that he, the decedent, and others had entered into four or five smaller oil ventures in 1948 and 1949, each making matching investments of about \$14,000. The oil ventures were unsuccessful.

In explaining the transaction involving the claim note, claimant testified that decedent came to him about two weeks before May 21, 1951, and stated that he needed \$100,000 "for a little bit". According to the claimant, the claimant told the decedent that he didn't have \$100,000 but could possibly scare up \$70,000 or \$80,000 in two weeks time and that about two weeks later he gave decedent \$52,000 in cash and checks he had received from car purchasers totaling \$26,000. Complainant said that he had about \$18,000 in cash of his own when decedent made the request and that he raised the balance of the \$78,000 delivered to decedent by "liquidating" his inventory of used cars. No one witnessed the delivery of the money, which he stated occurred at the used car lot, and it likewise appears that the transaction was unknown to anyone else. Claimant stated that he typed the note himself, that he placed it in a fireproof box in his home, where it remained until after the decedent's death, and that he had exhibited the note to no one, nor told anyone about it, until he showed it to his attorney after the decedent's death.

Claimant admitted that decedent had frequently made loans to him ranging up to \$6,000 after March 21, 1951, and claimant also acknowledged that decedent had made him a loan of \$42,000 prior to that date. He stated, however, that he did not owe decedent \$35,320 as set forth in the account stated on December 26, 1952, and said he had no recollection of signing the latter document. When questioned about endorsements on the claim





note, claimant said that he had himself made the April 6, 1954, payment of \$1,000, and the September 8, 1956, payment of \$700 by drawing funds out of money he was holding in trust for the benefit of decedent (presumably the trust created in the account stated) and that he had done so without any direction from decedent. He could not recall the payment of \$500 on September 8, 1956, but stated that payment of \$2,500 endorsed on the note as of April 8, 1964, had been paid by the decedent in cash. Claimant stated that decedent gave him the cash at a used car lot of a man named Artner, in the latter's presence, and that the claimant had the note with him and that he, the claimant, put the endorsement on it at that time. He couldn't remember whether the final two payments of \$1,000 and \$1,500 were paid by check or cash but stated that the \$1,000 had been given to him while he and the decedent were at a restaurant and the second while he was at a lunch counter.

Prior to the hearing on the motion for summary judgment, the executor had filed a waiver of objections to the competency of claimant's affidavit and deposition (1971 Illinois Revised Statutes, Ch. 51, §2), as to the summary judgment motion only, and not for any other purpose. At the conclusion of the hearing, the trial court entered an order granting summary judgment for the executor and disallowing the claim after making findings that a claim under the note was barred by the statute of limitations; that the claim was barred by the admissions of claimant in the exhibits heretofore referred to; that the claim was barred by the account stated as of December 26, 1952; and that there was no genuine issue as to any material fact. In the memorandum of opinion which preceded the formal order, the court also commented: "It is impossible to



believe that Everett Madison was indebted to claimant and yet claimant would thereafter have borrowed money from Madison in large amounts from time to time and repay said borrowed sums, as is clearly shown by the exhibits and admitted by claimant in his deposition".

On appeal in this Court, claimant first contends that the trial court erred in finding that the claim had been barred by the statute of limitations (1971 Illinois Revised Statutes, Ch. 83, Par. 17). In view of our disposition of the case we believe it is unnecessary to discuss this issue.

Under Section 57 of the Civil Practice Act (1971 Illinois Revised Statutes, Ch. 110, Par. 57) it is directed that a summary judgment should be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, "show that there is no genuine issue as to any material fact" and that the moving party is entitled to a judgment or decree as a matter of law. As pointed out in RUBY v. WAYMAN, 99 Ill. App. 2d 146 at 150:

"Courts have construed this section to mean that in determining if there is a genuine issue, inferences may be drawn from the facts which are not in dispute, and if fair-minded persons could draw different inferences from these facts, then a triable issue exists. Peirce v. Conant, 47 Ill. App. 2d 294, 300, 198 N.E. 2d 555."

In making such determination, as the court in RUBY v. WAYMAN, supra, further stated:

" . . . the court must construe the pleadings, depositions and affidavits most strictly against the moving party and most liberally in favor of the opponent."

As stated in SCHUMACHER v. FATTEN, 18 Ill. App. 2d 387, 390-391:

"The purpose of such procedure is not to try an issue of fact but to determine whether one exists between the parties."

At the time of the deposition, claimant professed to have no knowledge of the document of December 26, 1952 (labeled "an account stated" by the



executor) or of having signed such document. Yet, later in his deposition, he stated that he had made the first two payments on decedent's note by drawing funds from a trust he had created for decedent's benefit. It is the purport of the document of December 26, 1952, that it had created just such trust for obligations from Giroux to Madison. In his affidavit, made subsequent to the deposition, claimant's recollection was improved, for on this occasion he stated under oath that he had signed the document of December 26, 1952, on advice of counsel that it was a mere legal technicality. Further, in his deposition, claimant first stated that he "did not know" if he owed decedent \$35,320 as stated in the document of December 26, 1952, but when the instrument was produced he said he was "positive" that he did not. Also, claimant first gave testimony to the effect that, prior to his purported loan of \$78,000 to decedent, his only business relationship with decedent had been to pilot the latter on various trips throughout the country. He had testified earlier, inconsistently, that the decedent had loaned him \$42,500 prior to the time of claimant's loan to decedent, and claimant later testified that he and the decedent had entered into some oil transactions in 1949 or 1950.

The recitals referred to are simply examples of certain inconsistencies which appear throughout the deposition. To overcome them, claimant states that they merely go to credibility, and contends that a court may not weigh evidence on a motion for summary judgment. He reverts to his position that his denial of payment or settlement made summary judgment improper. As we view the language of the statute, the trial court could, and did in this case, properly consider such inconsistencies in making its determination as to whether the claimant (in opposing the summary judgment motion) had successfully and



properly established that there was a "genuine" issue of fact to be tried. The documentary evidence (fixed and established before the death of Madison and the assertion of the claim by Giroux) clearly established that Giroux was in fact indebted to Madison.

It stands undenied in the record that claimant stated under oath in a 1953 Federal Court bankruptcy proceeding, two years after the date of the note filed by the claimant, that claimant was insolvent, and also that one of his creditors was Everett Madison (if a \$78,000 note from Madison had been shown it would have made Giroux solvent). Also, in a citation proceeding but a few months before decedent's death, claimant stated under oath that he had no assets. Yet he now contends after many years and after the death of Madison that he has at all times had the note of decedent as a valid obligation. There was evidence to establish that Madison was not an orderly person and that, if a note had been paid or discharged, Madison might not have received the note. The "account stated" document was obviously designed to establish the amount of the debtor-creditor relationship between Giroux and Madison in December of 1952. Madison was shown therein as a creditor of Giroux to the extent of \$35,320. No evidence which would be competent was shown in the deposition or affidavit which could operate to contradict this established debtor-creditor relationship. Admissions of Giroux of record in the bankruptcy case and in the other court proceeding, to the effect that he had no assets, operate to corroborate the "account stated" document. The trial court could properly conclude that the claimant failed to show facts, which could be established by competent evidence, to support claimant's position. We, therefore, believe that the trial court was justified in denying relief in that court to the





claimant, and that the trial court's conclusion that the record and exhibits, including admissions by the claimant that Everett Madison was not indebted to him, justified the court's determination that there could not be considered to be a fairly disputed question of fact in that case.

For the reasons stated, the judgment of the Circuit Court of Kankakee County will be affirmed.

Judgment Affirmed.

Scott, J. and Dixon, J. concur.



7IA<sup>3</sup> 459

(24540-4M-970) 160 c

STATE OF ILLINOIS

—  
APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE IRLAND S. JIMKINS Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 20th day  
of September A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



STATE OF ILLINOIS  
IN THE APPELLATE COURT  
FOURTH DISTRICT

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
PLAINTIFF-APPELLEE	)	
vs	)	Appeal from
ROBERT ADEAN McCULLOUGH,	)	Circuit Court
DEFENDANT-APPELLANT	)	Adams County

---

MR. JUSTICE SIMKINS delivered the opinion of the Court.

Defendant-Appellant Robert Adean McCullough, entered a plea of guilty to the crime of theft of property having value in excess of One Hundred Fifty Dollars. He was sentenced to an indeterminate term of two to five years in the penitentiary. Thereafter he filed, pro se, a petition for post-conviction relief. The "Supplemental Public Defender" of Adams County was appointed to represent the defendant in the post-conviction proceedings. An amended petition was filed. The pro se petition was a conglomerate of charges and claims most of which, if true, would afford no basis for post-conviction relief. The defendant did charge, however, that he was denied the effective assistance of counsel in the proceedings which led



to his conviction and sentence. The amended petition did not contain the allegation with reference to counsel. The trial court dismissed the amended petition on motion on the ground that it did not set forth any substantial violation of defendant's constitutional rights.

We have examined the record and reverse because it fails to establish compliance with Supreme Court Rule 651 in that it contains no certificate or showing that counsel, appointed in the post-conviction proceeding, contacted defendant in person or by mail to ascertain his contentions of deprivation of constitutional right. In view of the holdings in *People v Smith* 37 Ill.2d 622, 230 N.E.2d 169; *People v Terry* 46 Ill.2d 75, 262 N.E.2d 923; and *People v Augerbright* 43 Ill.2d 94, 251 N.E.2d 180, we direct that counsel other than the Public Defender or Supplemental Public Defender be appointed. Cause reversed for further proceedings consistent with the views expressed herein.

Trapp, P. J., and Smith, J. concur.





State of Illinois )  
Appellate Court ) ss:  
Second District )

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On September 29, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

FILED

SEP 20 1972

HOWARD K. KELLEY, Clerk  
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Plaintiff-Appellee	)	Appeal from the 19th
	)	Judicial Circuit
-vs-	)	DuPage County
	)	
DENNIS R. HEINZ	)	Hon. L. L. Rechenmacher
Defendant-Appellant	)	Judge Presiding

MR. JUSTICE GUILD delivered the opinion of the court:

The trial court, upon a stipulation of facts found the defendant guilty of the crime of burglary and theft. He was granted probation for two years, the first ninety days to be served in the County Jail at Wheaton. He requested, and the court released him from his confinement prior to the serving of the full ninety days. Shortly after his release he was convicted of two separate offenses of deceptive practices and two separate offenses of theft in Cook County and sentenced to nine months in the State Prison farm at Vandalia. A petition was filed to revoke probation in Du Page County and on October 1, 1971, his probation was revoked and he was sentenced to a term of not less than eighteen months nor more than four years in the State Penitentiary.

Defendant was represented by private counsel at the time probation was granted and at the time probation was revoked. The Public Defender was appointed to represent him in this appeal and has now filed a motion to withdraw, alleging that there are no grounds for a meritorious appeal.



We have followed the dictates of Anders v. California, 386 U.S.738. The appeal has been considered on the basis of the record, together with counsel's motion. The record shows that defendant's probation was revoked in accordance with Ill. Rev. Stat. Ch. 38, Sec. 117-3 (1969) and decisions thereunder. The record indicates that the sentence imposed was appropriate to defendant's offenses and was not excessive.

Finding no error, the motion to withdraw is allowed and the judgment of the Circuit Court of Du Page County is affirmed.

MOTION ALLOWED. JUDGMENT AFFIRMED.

SEIDENFELD, P.J. and ABRAHAMSON J . Concur.



## UNITED STATES OF AMERICA

State of Illinois )  
Appellate Court ) ss:  
Second District )

ARST.

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable MEL ABRAHAMSON, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

September 29, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

**FILED**

SEP 20 1972

HOWARD K. KELLETT, Clerk  
Appellate Court, 2d District

THE PEOPLE OF THE STATE OF )  
ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
HERDIS SOCKWELL, JR., )  
 )  
Defendant-Appellant. )

Appeal from the Circuit  
Court of the 17th Judi-  
cial Circuit, Winnebago  
County, Illinois.

MR. JUSTICE ABRAHAMSON delivered the opinion of the court.

The defendant, Herdis Sockwell, Jr., was arrested on April 12, 1969, for the crime of rape. On April 28 Sockwell waived his right to a preliminary hearing and he was indicted together with Webster Williams and Roy Junior James. On July 28, all three defendants waived their right to a jury and the matter proceeded to trial. On July 31, all three were found guilty as charged in the indictment and, subsequently, the court denied motions for a new trial and in arrest of judgment. After a hearing in aggravation and mitigation, Sockwell was sentenced on September 11 to a term of 8 to 20 years in the penitentiary. Williams received a similar sentence and James was sentenced to a term of 6 to 20 years.

The complaining witness testified that she was accosted by two men as she left a laundromat in Rockford



at approximately 1:30 A.M. on Saturday, April 12. One of the men, identified as Sockwell, she had observed only moments earlier in the back of the laundromat.

After a brief and futile effort to run away, the complainant was carried by the two men, identified as Sockwell and James, to a red Pontiac automobile, driven by the third defendant, Williams. She was placed in the back seat of the vehicle and her clothing forcibly removed. The car was driven a short distance away, parked in an empty lot where each of the men had intercourse with her. She testified that she begged them not to hurt her.

After the intercourse was completed, the complainant pulled on her clothing and ran approximately 1-1/2 blocks to the home of her former sister-in-law. She told her that she had been raped and the police were immediately summoned. A hospital examination shortly thereafter verified that intercourse had, in fact, occurred.

During the morning of April 12, a brother of the victim stopped a red Pontiac in Rockford and held the occupants, Williams and James, at gunpoint until the police arrived. Williams and James were arrested and shortly thereafter gave statements to the police.

During the evening of April 12, police officer Leroy Scholl of the Rockford police department telephoned the Sockwell home and advised him that he was charged with rape. He was picked up at his home and taken into custody. On April 13, Sockwell furnished a statement to the police in which he stated that he



had removed the clothing of the complainant and was the first to have intercourse with her while she was asking them not to hurt her.

On appeal, Sockwell contends that (1) his arrest was illegal; (2) his statement, given as a consequence of an illegal arrest and in violation of his constitutional rights, should have been suppressed; (3) the trial court improperly restricted his pretrial discovery; (4) his guilt was not established beyond a reasonable doubt; and (5) that there was no valid reason for the disparity of his sentence and that given James and that, therefore, his should be reduced.

Prior to the trial, the defendant made a motion to suppress his confession. That motion challenged the statement given by Sockwell on the ground that it was involuntary. It alleged that he was arrested on mere suspicion, not upon reasonable cause; that he was illegally detained; that he was deprived of his right to counsel; and that he did not understandingly waive his constitutional rights. That motion was denied after a hearing.

A motion to suppress a confession on the grounds that it is involuntary is brought under the Fifth and Fourteenth Amendments of the United States Constitution and section 10 of Article II of the 1870 Illinois Constitution. Section 114-11 of the Criminal Code provides that the state has the burden of going forward with the evidence and proving that a confession is voluntary. Ill. Rev. Stat. 1969, ch. 38, par. 114-11 (d).



A motion to exclude a confession on the ground that it arose from an illegal arrest is brought under the Fourth and Fourteenth Amendments of the United States Constitution and Section 6 of Article 10 of the former Illinois Constitution. Section 114-12 of the Code provides that the burden of proof in a motion to exclude is on the defendant. Ill. Rev. Stat. 1969, ch. 38, par. 114-12 (b).

It is clear from the body of the motion and the evidence adduced at the hearing that the motion of the defendant was brought under the Fifth Amendment to suppress his confession as involuntary rather than under the Fourth Amendment to suppress evidence. It appears from the record, although it is not altogether clear, that Sockwell was arrested on the basis of a verified complaint signed by police officer Leroy Scholl before a notary public and that no arrest warrant was ever issued. An officer may make an arrest without a warrant, of course, if he has reasonable grounds to believe that the person has committed an offense. (People v. Harris, 105 Ill. App. 2d 305,<sup>314</sup>/245 N.E. 2d 80,84; Ill. Rev. Stat. 1969, ch. 38, par. 107-2 (c).) As we have said, the burden is on the defendant to show that an arrest is illegal and the defendant neither moved to suppress the evidence on that basis or offered proof to show that the arrest was, in fact, illegal. Indeed, the record bears out that Scholl arrested Sockwell after the police had taken the statements of Williams and James that implicated





Sockwell in the commission of the crime. We, therefore, hold that the defendant cannot here, for the first time, question the legality of his arrest.

Officer Scholl testified that he advised Sockwell of his right to remain silent on the way to the station after his arrest on April 12 and that Sockwell said he "...didn't care to talk about it." The next morning, before 8:00 A.M., Scholl was informed that Sockwell wished to speak to him. Sockwell then asked if he could telephone his mother and asked her if she had hired a lawyer. At the end of his telephone call, Sockwell told Scholl that he wished to make a statement. Scholl then read Sockwell the so-called "Miranda Warnings" in regard to his rights and Sockwell signed a waiver. Sockwell then gave the statement in which he admitted having intercourse with the complainant and signed it after it was typewritten. Sockwell, however, denied that he asked to speak to Scholl or that he was informed of his rights prior to his statement and testified that he signed the waiver on April 14 or over 24 hours later.

The conflict in the testimony in regard to the circumstances surrounding the statement was one to be resolved by the trial court. The cases have consistently held that it is for the trial court to determine the competency of a confession and that it need not be established beyond a reasonable doubt. (People v. Nicholls, 42 Ill. 2d 91, 245 N.E. 2d 771, 777; People v. Carter, 39 Ill. 2d 31, 233 N.E. 2d 393, 397.) Clearly, the determination of the trial court that Sockwell was advised as to his rights prior to



his statement was not against the manifest weight of the evidence and therefore will not be disturbed on review.

We also cannot agree with the contention of the defendant that Scholl attempted to "break his will" by admonishing him to "tell the truth" before his statement was made. Although an earlier case held otherwise, it has been well established that a mere statement to tell the truth does not make a confession ipso facto involuntary. (People v. Joe, 31 Ill. 2d 220, 225; People v. Klyczek, 307 Ill. 150.) Neither do we agree that Scholl was precluded from taking the statement after he overheard Sockwell's telephoned inquiry to his mother in regard to the hiring of an attorney. The court found that Sockwell was advised both orally and in writing of his right to counsel and that he waived the right before making the statement and, as we have said, that finding will not be disturbed.

The defendant next argues that the court improperly restricted his pretrial discovery when it denied his motion for copies of the written statements of the complaining witness. It appears from the record that the statements were furnished the defense during the trial after the witness testified and that she was extensively cross-examined in regard to the alleged inconsistencies. Under the new Supreme Court Rules, these statements would be subject to disclosure. (Ill. Rev. Stat. 1971, ch. 110A, par. 412.) However, under the rules of practice then in effect, the order of the trial court was perfectly proper. Although there is some indication that the prosecution agreed to attempt to have the complainant



available for a meeting with defense counsel prior to trial, they were unable to do so. Witnesses are not obligated to speak to the defense and cannot, of course, be compelled to do so. (People v. Jackson, 116 Ill. App. 2d 304, 314, 253 N.E. 2d 527, 533; People v. Mitchell, 16 Ill. App. 2d 189, 147 N.E. 2d 883.) In view of the complete cross-examination of the witness, after her statements were made available, we do not see that the defendant was prejudiced in any event.

It is also contended by the defendant that he was not proven guilty beyond a reasonable doubt since there were no visible scratches, bruises or other evidence of violence on the person of the complaining witness or the three defendants. The general rule is that the evidence must show such resistance on the part of the complaining witness as will demonstrate that the act was against her will. Resistance is not necessary, however, under circumstances where resistance would be futile and would endanger the life of the female, or where she is overcome by superior strength or paralyzed by fear. People v. Clarke, 50 Ill. 2d 104, 277 N.E. 2d 866, 869; People v. Smith, 32 Ill. 2d 88, 92.

Here, there was evidence that the complaining witness was abducted by two men on the street and dragged approximately a half block to where a third man waited in an automobile. At one point, she grabbed a post and begged the men to release her but was forced from the post and pushed into the back seat of their



car. One of the defendants, James, had a metal hook in place of an amputated arm that the witness thought was a switchblade knife. Although there was no testimony that she attempted to scratch or hit her abductors in the car, the complainant did testify that she repeatedly begged them to let her alone and not hurt her and felt that her body "froze". Under these circumstances, further resistance by the complainant would have obviously been both futile and dangerous. In addition, her prompt complaint to the police serves as corroboration of her testimony. (People v. Murphy, 124 Ill. App. 2d 71,<sup>75,</sup>/260 N.E. 2d 386, 388.) We are completely satisfied that there was sufficient proof to establish the guilt of the defendant.

Finally, the defendant contends that there was no reason for the disparity in the sentence given the defendant and his co-defendant, James, and that his sentence should therefore be reduced. Section 1-2 of the Criminal Code provides that it should be construed in accordance with the general purpose, among others, to prescribe penalties "...which permit recognition of differences of rehabilitation possibilities among individual offenders..." (Ill. Rev. Stat. 1969, ch. 38, par. 1-2 (c).) It is not necessarily contemplated that the same sentence will be imposed on persons guilty of the same offense. (People v. Loyd, 125 Ill. App. 2d 196,<sup>202,</sup>/260 N.E. 2d 63, 65.) The court found that James, in addition to his physical disability, had a low mental capacity and that he was "easily led". The evidence





showed that he was the last to have intercourse with the complainant and the least aggressive of her assailants. All of these circumstances could be considered as reason to believe that the rehabilitative possibilities of James were greater than his co-defendants and justify the disparity of sentence.

In any event, the sentence given the defendant was well within the limits imposed by the statute and was not an abuse of discretion by the trial court.

The motion by the defendant suggesting diminution of record and leave to file additional record instant, taken with the case, is allowed.

Affirmed.

SEIDENFELD, P.J. and GUILD, J., concur.



7 I.A<sup>3</sup> 537

72-3

STATE OF ILLINOIS

PEOPLE VS. CLARENCE CLIFFORD



ABST.

APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at  
Ottawa, on the 1st Day of January in the Year of our Lord  
one thousand nine hundred and seventy-two, within and  
for the Third District of Illinois:

Present—+ PC

HONORABLE ALLAN L. STOUDER, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on  
\_\_\_\_\_  
SEPTEMBER 27, 1972\_\_\_\_\_the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the  
words and figures following, viz:



IN THE APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court
	)	of Tazewell County.
vs.	)	
	)	
CLARENCE CLIFFORD,	)	
	)	HONORABLE
	)	James D. Heiple,
Defendant-Appellant.	)	Presiding Judge.

PER CURIAM.

Abstract

The defendant, Clarence Clifford, was indicted for burglary by the Grand Jury of Tazewell County. The defendant originally pled not guilty to the charge contained in the indictment but subsequently changed his plea pursuant to a negotiated plea arrangement with the State. He was thereafter, pursuant to the terms of the agreement, sentenced to a term of not less than eight nor more than fifteen years of imprisonment in the penitentiary. Bruce Stratton of the Illinois Defender Project has filed a motion for leave to withdraw as counsel for the defendant and has filed a brief in support thereof pursuant to Anders v. California, 386 U. S. 738. It was indicated in such motion that after careful examination of the record the counsel so appointed has concluded that an appeal would be wholly frivolous and could not possibly be successful. We have therefore examined the record completely in this cause. We agree that no challenge could be raised regarding either the indictment or the sentence.

Directing our attention to the negotiated plea arrangement, we note that the record clearly discloses that the trial court admonished the defendant in compliance with the rules set



forth in Chapter 110A, Section 402(a), Illinois Revised Statutes. The trial judge advised the defendant of the nature of the charge and the prescribed penalty by reading the language of the statute. He further explained the possible penalty in his own words, stating that "the Court could fix a sentence anywhere within the limits allowed by law- that is to say, a minimum of not less but could be more than one year and any maximum with any period of time. . . ." This is substantially the same language describing the statutory penalty held to be sufficient in People v. Gaines, 48 Ill. 2d 191, 268 N.E. 2d 426.

The court further admonished the defendant that he had a right to remain silent, a right to cross examine witnesses for the state, a right to offer evidence tending to show he was not guilty, a right to insist that the state prove him guilty beyond a reasonable doubt, and the right to be tried before a jury. The defendant indicated that he knowingly understood the statutory offense and the possible penalty and he thereafter voluntarily waived his right to plead not guilty and to seek a jury trial.

It should be noted that the trial court further heard the undisputed factual basis for the plea. The state advised the court that if called upon they could produce witnesses to show the defendant and a companion were apprehended by police officers in a V. F. W. Post building in the early morning hours of February 8, 1971, and that after receiving the warnings required by Miranda the defendant made both oral and written confessions to the crime. The record further discloses that the trial judge complied with the requirements of a negotiated plea as set forth in Chapter 110A, Section 402(d), Illinois Revised Statutes, in that the agreement was disclosed in open court and the defendant indicated his satisfaction with it.





Under the terms of the agreement the defendant pled guilty to the charge of burglary and the state recommended a sentence of eight to fifteen years and further agreed to seek the dismissal of two other burglary charges pending against the defendant in the counties of Peoria and Mason. The trial judge acceded to this agreement and sentenced the defendant in accordance with the term recommended.

While a sentence of not less than eight nor more than fifteen years of imprisonment in the penitentiary is not one which could be considered light, we have to take cognizance of the fact that in the instant case the state offered evidence that the defendant had pled guilty to burglary on three previous occasions. Our Supreme Court has upheld more severe sentences in cases where the defendant has pled guilty to the crime of burglary. See People v. Smith, 14 Ill. 2d 95, 150 N.E. 2d 815, and People v. Richeson, 24 Ill. 2d 182, 181 N.E. 2d 170.

There is no indication in the record that the defendant's attorney did not meet the standards of competence as required by McMann v. Richardson, 397 U. S. 759, 25 L. Ed. 2d 763, 90 S. Ct. 1441, and the defendant has at no time expressed any dissatisfaction with the assistance of the counsel which he received before the trial court.

Following our complete examination of all the proceedings in accordance with Anders v. California, supra, we agree with the position of counsel handling appeal in this cause. We have heretofore entered an order granting said counsel leave to withdraw and upon review of this cause we find the judgment of the circuit court of Tazewell County should be and the same is accordingly affirmed.

Judgment affirmed.



7IA<sup>3</sup>558

(24540--JM--9-70) 160-0

STATE OF ILLINOIS

—  
APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding JudgeHONORABLE SAMUEL O. SMITH, JudgeHONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

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BE IT REMEMBERED, that to-wit: On the 27th day  
of September A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

---

People of the State of Illinois,	)	
	)	
Plaintiff-Appellee	)	Appeal from
	)	Circuit Court
vs.	)	Adams County
	)	
Donald Eston,	)	
	)	
Defendant-Appellant	)	

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MR. JUSTICE SMITH delivered the opinion of the court:

The Illinois Defender Project moved to withdraw as defendant's counsel and accompanied the motion with a brief in conformity with *Anders v. State of California*, 386 US 738, 18 L ed 2d 493, 87 S Ct 1396. The record shows proof of service on the defendant of the motion and its accompanying brief. The motion was continued for 60 days for the defendant to file any further or additional suggestions. None were filed.

The record shows that the defendant was charged with burglary of a building in Quincy, Illinois. He offered to



plead guilty to this burglary if the State would dismiss a pending burglary charge and an escape charge, and if the State would recommend a sentence of two to eight years. He was represented by counsel and the negotiated plea arrangement was carried out specifically by the trial court's order.

The only issue in the case was whether or not the trial court adequately admonished the defendant before accepting his plea of guilty. The record indicates that the court was satisfied that the plea was knowingly and voluntarily made, that the defendant understood the nature of the charge of burglary and the penalty imposed, that the defendant said he understood the nature of the charge and understood the penalty for burglary. The court had on the original arraignment admonished the defendant that the possible penalty for burglary was one to life. In view of the fact that this was a negotiated plea, we think the record shows an adequate compliance with Illinois Supreme Court Rule 402(a) even though on the date that the court accepted the plea, the possible penalty of one to life was not repeated to the defendant. The record further indicates that there had been no promises or threats made to the defendant to induce his plea other than the plea negotiations agreement. The factual basis for the plea was grounded on





a stipulated version of the burglary offense by the State's attorney and defense counsel and by a personal acknowledgment by the defendant. Under these circumstances, the defendant was adequately warned and advised.

In view of this record, we are constrained to agree with the public defenders who represented this defendant on appeal that there is no justiciable issue for this court to review and that such a full-blown review is unwarranted and frivolous. Accordingly, the petition of the Illinois Public Defender Project to withdraw as counsel for the defendant is allowed and the judgment of the trial court is affirmed.

Judgment affirmed.

Craven, P.J. and Simkins, J. concur.



7IA<sup>3</sup>563

(24540-4M-970) 160-3



## STATE OF ILLINOIS

## APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LEMLAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 4th day  
of October A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



## STATE OF ILLINOIS

General No. 11660

Agenda No. 72-60

Tryco Manufacturing Company, a Corpora-  
tion,

Plaintiff-Appellant

vs.

Rolph W. Riley, d/b/a R.W. Riley Dis-  
tributing Company,

Defendant-Appellee

Appeal from  
Circuit Court  
Macon County

MR. PRESIDING JUSTICE TRAPP delivered the opinion of the court:

Plaintiff corporation, Tryco, sued for the purchase price of an item of equipment assertedly sold to defendant, Riley. The court granted summary judgment to Riley and Tryco appeals.

Riley invoiced the equipment to Chemical, but claims that it was but an agent for Tryco, and that Riley himself is not liable for the purchase price. In support of the motion for summary judgment, Riley alleged that in a certain suit filed and heard in Texas Tryco asserted ownership and sale of the equipment to Chemical.

The plaintiff's counter-affidavit alleged that prior to filing the proceedings in the Texas case, the plaintiff and Ralph W. Riley, the defendant in the present case, entered into an oral agreement that the legal proceedings in the Texas cause were to be brought in the name of the plaintiff for the purpose of avoiding the duplication of costs and for the convenience of the parties.



and that the legal costs incurred by Tryco Manufacturing Company in the Texas cause were to be divided equally between plaintiff and Riley. Plaintiff's counter-affidavit alleges further that by reason of the foregoing agreement, plaintiff was the owner of one of the floaters involved in the Texas case, but not of the floater which is the subject of this lawsuit.

Exhibit "A" to the answer and counter-claim is a letter from Tryco to Riley which authorized him to deliver the floater to Chemical Producer Corporation, directs the defendant to invoice Chemical, and instructs the defendant to use "Purchase Order 5250" at a price of \$13,572. The following excerpt from the letter tends to support plaintiff's allegation in his counter-affidavit that it was the owner of one of the floaters involved in the Texas suit but not of floater No. 131:

"(I) let Mr. Parton (of Chemical Producer Corporation) talk me out of a spotlight and suggested he install it and send a copy of his billing to you and you would reimburse. At the same time, I've authorized him to send to me bills for larger western mirrors that he installed on the other machine."

Also the exhibits contain two invoices, one from the plaintiff which bills the floater to the defendant at a price of \$8,889.63, and another invoice from the defendant to Chemical, billing the latter for the floater at \$13,572.

The disposition of a motion for summary judgment is to be determined upon the record as a whole. Saghin v. Romash, 122 Ill. App.2d 473, 258 N.E.2d 581. A motion for summary judgment should be denied where an issue of fact exists. Ruby v. Wayman, 99 Ill.





100,000 146, 240 N.E.2d 699.

Upon the documents before the court indicating the existence of two separate pieces of equipment, the discussion of the separate billings, as well as the difference in prices in the invoices from Tryco to Riley and from Riley to Chemical, it would appear to a reasonable man that there is a triable issue of fact as to whether Tryco sold the equipment to defendant. Upon such conclusion, the summary judgment was improper.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED.

SMITH and SIMKINS, JJ., concur.



7IA<sup>3</sup>567

(24540-4M-9-70) 160-o



STATE OF ILLINOIS

ABST.

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 4th day  
of October A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



## STATE OF ILLINOIS

General No. 11733

Agenda No. 72-64

City of Decatur,

Plaintiff-Appellee

VS.

Edward H. Kushmer,

Defendant-Appellant

Appeal from  
Circuit Court  
Macon County

MR. PRESIDING JUSTICE TRAPP delivered the opinion of the court:

The City charged defendant with violation of a municipal ordinance which prohibited storing or placing refuse or trash of stated kinds upon the premises which might harbor rats. Written complaint and notice to appear were served; defendant appeared and filed an answer and counter-claim and demanded a jury trial. The trial court allowed a motion to strike parts of defendant's answer and dismissed the counter-claim. Defendant's motion to vacate such order was denied and upon the calling of the case for trial, defendant moved to withdraw his appearance and motion for jury. Defendant, through counsel, refused to participate in the trial and announced that the court "would just have to proceed by default". The court heard evidence as upon default and entered judgment for the penalty. Defendant appeals upon briefs prepared by counsel, who died prior to oral argument.



The brief asserts innumerable constitutional issues, but the Supreme Court transferred the appeal.

One category of alleged constitutional issues is based upon the contention that proceedings for violation of an ordinance are of civil quality, but that criminal process was used and that he was denied the benefits of the Civil Practice Act. The complaint and process used are authorized by the statute, Ill. Rev. Stat. 1969, ch.24, par.1-2-9. Essentially, these issues are disposed of by the fact that defendant appeared and submitted to the jurisdiction of the court. Wilson Bros. v. Haeze, 347 Ill. 140, 179 N.E. 459; Athens v. Ernst, 342 Ill.App. 357, 96 N.E.2d 643. After defendant's appearance, the proceedings were as in civil matters.

Paragraph 2 of defendant's answer alleged that the premises did not, in fact, harbor rats. Defendant urges denial of due process in striking such allegation. The paragraph is, in fact, a statement of the pleader's conclusion. Moreover, in City of Decatur v. Kushmer, 43 Ill.2d 334, 253 N.E.2d 425, the Supreme Court determined that such an allegation was not a defense under the ordinance.

Paragraph 3 of the answer alleged that the proceedings were, in fact, designed to abolish defendant's business as a non-conforming zoning use. The allegations of improper motive for the proceedings is not an issue as a violation of the ordinance.

The counter-claim, which was dismissed, alleged frequent complaints under the ordinance against defendant for the purpose





of compelling him to abandon a non-conforming zoning use and to deprive defendant of the use of his premises; that no rats have ever been seen on the premises; that others violated the ordinance but were not prosecuted; and that by reason of such prosecutions the defendant's business has been injured, and that defendant has suffered great mental distress and anxiety which caused him to incur medical and hospital expenses, as well as great legal expenses.

It is said that such allegations state a cause of action for abuse of process. Allegations of ulterior purpose alone are not sufficient. Siegel v. City of Chicago, 127 Ill.App.2d 84, 261 N.E.2d 802. The issue is essentially controlled by Holiday Magic, Inc. v. Scott, \_\_\_ Ill.App.3d \_\_\_, 282 N.E.2d 452. In that case, plaintiff alleged that legal proceedings were filed and used with the ulterior purpose of killing plaintiff's business through adverse publicity. Stating that such allegations were conclusions of the pleader, the court said:

"But, even assuming that these allegations are sufficient properly to allege the existence of an ulterior purpose, there is no allegation regarding any act in the use of process that was not proper in the regular prosecution of the proceedings; ..."

As stated in Prosser, Handbook of the Law of Torts, 4th Ed. 1971, p.857, abuse of process involves:

"Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusions, even though with bad intentions....."



Upon such authority, the counter-claim fails to state a cause of action and abuse of process.

It is urged that dismissal of the counter-claim as failing to state a cause of action denies a certain remedy for wrongs under Art.II, par.19 of the Illinois Constitution. It has been held that where pleadings are insufficient to state a cause of action, dismissal is not a denial of constitutional rights.

Bauscher v. City of Freeport, 103 Ill.App.2d 372, 243 N.E.2d 650.

The judgment is affirmed.

AFFIRMED.

CRAVEN and SIMKINS, JJ., concur.



## STATE OF ILLINOIS

## APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE JAMES C. CRAVEN, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

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BE IT REMEMBERED, that to-wit: On the 20th day  
of September A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



FILED

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

RECEIVED  
Clerk of the Appellate Court  
Fourth District  
Springfield, Illinois

General No. 11538

Agenda 72-30

Carroll L. Hayes,  
Plaintiff-Appellee,  
vs.  
William B. Hayes,  
Defendant-Appellant.

Appeal from  
Circuit Court  
Champaign County

MR. JUSTICE CRAVEN delivered the opinion of the court:

This is an appeal from a decree of divorce, entered on jury verdict in favor of plaintiff, and from denial of defendant's post-trial motion. The decree awarded custody of the children to plaintiff wife, with rights of reasonable visitation to the defendant husband. After denial of such post-trial motion, the trial court, over written objection of defendant as to jurisdiction, heard evidence and entered a further order fixing and limiting defendant's right of visitation of the children. Defendant appealed from such further order by notice of appeal filed the same date as entry of the further order.

The divorce complaint charged habitual drunkenness and mental cruelty. Defendant's answer denied the charges. Upon trial, plaintiff testified to a resumption of marital





relations with defendant after all acts and conduct with which defendant was charged. Thereupon, defendant was granted leave to amend his answer and amended it alleging the affirmative defense of condonation. Motions for directed verdict at the close of plaintiff's evidence and at the close of all the evidence were denied.

At the beginning of the trial plaintiff waived alimony and child support. On her motion, such matters were stricken from the cause.

As to the appeal from the decree of divorce, defendant contends reversible error in (1) failure to direct a verdict because of insufficient evidence to support either habitual drunkenness or mental cruelty; (2) admitting numerous items of improper evidence including traffic offenses, arrests, bond forfeitures, judgments, acts or conduct of defendant toward third persons or firms, and opinions as to peaceableness; (3) refusing to grant a mistrial for prejudicial injection into the cause and interrogation of defendant about arrests, accusations, and being in jail; and (4) instructions given to the jury.

Defendant also contends reversible error and lack of jurisdiction of the trial court in entering its further order as to visitation limitations on defendant entered after notice of appeal was filed from the divorce decree.

The evidence was that the parties were married in 1949 and had three children; that defendant was a real estate broker.



and that plaintiff was of independent means. Plaintiff testified that over the years and up to commencement of this cause, defendant drank periodically and caused problems for her and her family; that he engaged in aggressive and hostile action towards others; and that he was a participant in a series of disorders with the police and that his drinking resulted in his financial difficulty. She described him as getting drunk a number of times each month for a period of several days at a time; that during his drinking bouts she never knew his whereabouts or when she might expect him home. She described his conduct on specific occasions from 1966 down to the end of year 1970, upon which occasions in each month during these years while in the drunken periods he was involved in some embarrassing or humiliating social experience. She testified that his drunken condition and engaging in fights caused her humiliation and anguish and made her life miserable and unendurable. However, she admitted she and her husband cohabited and continued sexual relations until August of 1970, at which time she informed him that she had filed for divorce.

Four acquaintances of the couple corroborated plaintiff's testimony of defendant's drinking behavior and his getting into fights at the Champaign Country Club while in an intoxicated and drunk condition. These witnesses also testified that defendant's reputation in the community for sobriety and peace and orderliness was bad.

Over objection of defendant, the circuit clerk testified the records of the circuit court showed a number of judgments



against defendant. Exhibits were placed in evidence of an assault charge against him, a bond forfeiture on an assault charge, and reckless driving charges. Plaintiff's attorney called defendant under Section 60 of the Civil Practice Act and asked him, "When were you last in jail?" Defendant moved for a mistrial. The trial judge sustained the objection as to the form of the question, but denied the motion for mistrial. Over objection, a question was asked of defendant as to a specific arrest on July 9, 1970.

An examination of the record in this case shows there was sufficient evidence on the issues of habitual drunkenness and mental cruelty so that the court properly denied the motions for directed verdict and submitted these issues to the jury. The evidence clearly showed more than occasional acts of drunkenness and testimony amply supported a pattern of defendant's habit of drinking and drunkenness and his inability to control it.

In Holmstedt v. Holmstedt (1943), 383 Ill. 290, 49 N.E. 25, the Supreme Court reversed the trial court's dismissal of a complaint charging habitual drunkenness and extreme and repeated cruelty and cited with approval Murphy v. People (1878), 90 Ill. 59, which held that a party who was drunk two to five times in two years was sufficiently proven guilty of habitual drunkenness. In Vesolowski v. Vesolowski (1949), 403 Ill. 284, 85 N.E.2d 695, the court held that evidence of a person's habit of continued drinking is an indication that his intoxication is not reformed, and it need not be shown that a person becomes intoxicated without



intermission to prove habitual drunkenness. Habitual drunkenness is a fixed habit of drinking to excess or such frequent indulgence to a state of drunkenness or excess drinking as to show a formed habit and inability to control the appetite for drinking. See Shorthose v. Shorthose (1943), 319 Ill.App. 355, 49 N.E.2d 280.

There also was ample evidence to submit the case to the jury on the issue of extreme and repeated mental cruelty. Whether certain acts or conduct constitute mental cruelty depends upon the entire factual background surrounding the conduct in question. It is determined primarily by its effect upon the particular person involved. Akin v. Akin (1970), 125 Ill.App.2d 159, 260 N.E.2d 481; Simonson v. Simonson (1970), 128 Ill.App.2d 39, 262 N.E.2d 326.

Extreme and repeated mental cruelty does not require proof that the aggrieved spouse's mental or physical health has been adversely affected. It is sufficient proof of mental cruelty if the aggrieved spouse's life has been made miserable and unendurable by the other spouse's acts or conduct, and that the aggrieved spouse has been subjected to humiliation and anguish. Akin v. Akin, supra; Simonson v. Simonson, supra; Loveless v. Loveless (1970), 128 Ill.App.2d 297; 261 N.E.2d 732; Stanard v. Stanard (1969), 108 Ill.App.2d 240, 247 N.E.2d 438.

Under the evidence in this case, the jury reasonably could have found that defendant's conduct resulted in rendering plaintiff's life miserable and unendurable and thus guilty of extreme and repeated mental cruelty.





The verdict was amply supported by the evidence as to proof both of habitual drunkenness and extreme and repeated mental cruelty. The instructions given properly instructed the jury and were consistent with the cases cited.

The jury necessarily found that the defendant had not established the affirmative defense of condonation. This finding is clearly sustainable by the evidence. Mere proof of cohabitation subsequent to a marital offense does not establish condonation. Condonation is the forgiveness of a prior matrimonial offense on condition that it shall not be repeated. In this case the jury could have found that the promise, either expressed or implied, that there would be no further violation of the marriage vows, was not kept. The evidence would indicate repetition of the condoned offenses subsequent to the asserted condonation. See 16 I.L.P. Divorce 466.

As to the claimed reversible error and prejudice of permitting introduction of evidence of arrests of defendant, judgments against him and bond forfeiture, we find no ground for reversal. Such tended to show the conduct of defendant and the effect of such conduct upon plaintiff. Plaintiff later testified as to the effect of these matters upon her when she learned of them. The court instructed the jury during the trial that such evidence was restricted solely to the issue of mental cruelty. In its written instructions, the court instructed the jury that whenever



evidence was received for a limited purpose, they could not consider it for any other purpose.

Permitting the introduction of such evidence for the purpose offered and with the court's instructions limiting the same to a proper purpose rendered the admission of such testimony and exhibits proper.

Finally, while it is the general rule that the filing of the notice of appeal from a trial court judgment terminates the trial court's jurisdiction of the cause, there are exceptions. One exception is that in divorce cases the visitation rights of the children is a matter independent of, and collateral to, the divorce decree itself and to the issue of custody. (Dear v. Locke (1970), 128 Ill.App.2d 356, 262 N.E.2d 27; Shapiro v. Shapiro (1969), 113 Ill.App.2d 374, 252 N.E.2d 93; Arndt v. Arndt (1947), 331 Ill.App. 85, 72 N.E.2d 718 (reversed on other grounds (1948), 399 Ill. 490, 78 N.E.2d 272; Dear v. Dear (1967), 87 Ill.App.2d 77, 230 N.E.2d 386 (U.S.Cert.Den. in 393 U.S. 871).) The trial court could properly change or redefine the visitation rights, as required under the circumstances.

The decision of the circuit court is affirmed.

DECREE AFFIRMED.

TRAPP, P.J., and SIMKINS, J., concur,



7 I.A.<sup>3</sup> 624

71-117

STATE OF ILLINOIS

PEOPLE VS. PHILLIP MAJESKI



ABST.

APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at  
Ottawa, on the 1st Day of January in the Year of our Lord  
one thousand nine hundred and seventy-two, within and  
for the Third District of Illinois:

Present—+ PC

HONORABLE ALLAN L. STODER, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

SEPTEMBER 22, 1972

the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the  
words and figures following, viz:



---

IN THE APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court
	)	of LaSalle County
vs.	)	
	)	
PHILLIP MAJESKI,	)	
	)	HONORABLE
Defendant-Appellant.	)	Walter Dixon,
	)	Presiding Judge.

---

PER CURIAM.

*Abstract*

The defendant, Phillip Majeski, was on April 13, 1970, indicted by the Grand Jury of LaSalle County for having committed the criminal offense of armed robbery. On July 6, 1970, the defendant before the circuit court of said county tendered his plea of guilty to the charge contained in the indictment, which was accepted by the court. He was on the same date sentenced to a term of imprisonment in the penitentiary of not less than two nor more than five years. On October 20, 1970, the defendant filed his pro se petition for post-conviction relief and later, on May 12, 1971, again acting pro se, filed a motion to amend his previous petition for post-conviction relief. On June 22, 1971, an evidentiary hearing was held in the trial court at which time the defendant was present and represented by court appointed counsel. Subsequent to this hearing the defendant's petition for post-conviction relief was denied. Thereafter Theodore A. Gottfried of the Illinois Defender Project was appointed to represent the defendant on appeal. Bruce Stratton of the Illinois Defender Project has now filed a motion for leave to withdraw as counsel for the defendant in his appeal and has filed a brief in support of said motion pursuant





to the ruling announced in Anders v. California, 386 U. S. 738. In such action counsel indicates that appeal in this case would be wholly frivolous and could not possibly be successful. We have therefore examined the record completely in this cause for the purpose of determining the issues on appeal.

It should first be noted that when the defendant filed his pro se petition for post-conviction relief and which was later amended, he raised the following issues:

- A. That an identification and line-up procedure followed in his case violated constitutional standards.
- B. That the defendant was held forty days from his arrest until he appeared before a magistrate and that during this time he was denied the assistance of counsel.
- C. That the defendant was denied due process and equal protection of law in that he was not advised as to his right to trial by jury, was not advised as to the maximum penalty for armed robbery, and that he did not receive a hearing in aggravation and mitigation of sentencing.
- D. That the defendant's indictment is invalid in that it cites Illinois Revised Statutes, Chapter 38, Section 17-2, and that the correct section of the Code is Chapter 38, Section 18-2.
- E. That the defendant's court-appointed counsel was unethical and inadequate in that by the time the defendant was brought to trial favorable evidence which he had was by then unavailable.
- F. That the defendant had pled guilty on advice of counsel who had stated the defendant would be granted probation.
- G. That the defendant's guilty plea was coerced.
- H. Lastly, that the defendant's post-conviction counsel was not consulting him.

We have set forth the numerous recital of errors claimed by the defendant and after examining the appropriate law and the



record in this case can only conclude that they are inappropriate for review or lack sufficient evidence to sustain them. Considering the issues as raised by the defendant, we first note that there was no evidence of any faulty identification or line-up procedure presented at the post-conviction hearing. There was evidence to the effect that the defendant had been held at least 11 days and perhaps as many as 40 days before he received an appearance before a magistrate, and such action does violate Chapter 38, Section 109-1 of Illinois Revised Statutes, but post-conviction relief is available only upon the denial of a constitutional right. See Chapter 38, Section 122, Illinois Revised Statutes. A statute does not convey constitutional rights. (People v. Orndoff, 39 Ill. 2d 96, 233 N.E. 2d 378). The record discloses that the denial of counsel to the defendant during this period of time resulted in no harm other than his continued detention since no confession was obtained without counsel and the defendant was in fact provided with counsel in advance of that time when he tendered his plea of guilty which was accepted by the trial court.

The record further discloses that the defendant was specifically advised of his right to a trial by jury but that he knowingly waived it, and he was also advised as to the minimum and maximum sentence for armed robbery and that the defendant knowingly waived a formal hearing in mitigation and aggravation of sentencing. Without making a detailed recital of the record it is suffice to say that the trial court's admonitions prior to the acceptance of the guilty plea by the defendant were adequate under Chapter 110A, Section 401 of the Illinois Revised Statutes.

The record discloses that the indictment did in fact contain the wrong citation in regard to the charge of armed robbery, however, such a wrong citation is considered a formal defect in the charge (People v. Hall, 55 Ill. App. 2d 255, 204 N.E. 2d 473)



and formal defects can be cured by amendment on motion by the State's Attorney or the defendant. See Chapter 38, Section 111-5, Illinois Revised Statutes. In the instant case both the State's Attorney and counsel for the defendant concurred in an amendment which corrected the wrong citation contained in the indictment and therefore the claim of the defendant as to reversible error on this ground is not sustainable.

There was a delay of shortly less than four months between the defendant's arrest and trial, however, such delay does not violate the statutory right to a speedy trial as required by Chapter 38, Section 103-5, Illinois Revised Statutes. See People v. Tetter, 42 Ill. 2d 569, 250 N.E. 2d 433, where an eighteen month delay was found not to constitute a constitutional denial of the right to a speedy trial. -

The record is barren of any evidence that the defendant pled guilty with the understanding that he would be granted probation. The only testimony to this effect came from the defendant himself and the trial judge indicated that when the defendant so testified the testimony was false and unbelievable. It should be noted that when the defendant's trial attorney was called to the witness stand during his post-conviction hearing he was not asked whether in fact he had told the defendant he would get probation in return for his tendering a plea of guilty. In a post-conviction proceeding the petitioner has the burden of proof. See People v. Stovall, 47 Ill. 2d 42, 264 N.E. 2d 174. A factual determination by a judge who hears evidence in a post-conviction hearing will not be disturbed on review unless manifestly erroneous. See People v. Bratu, 46 Ill. 2d 143, 262 N.E. 2d 921.

Defendant's claim that his plea of guilty was coerced is disposed of when the record clearly shows that no evidence was at any time introduced in an effort to sustain this alleged error.



While the defendant filed his petition for a post-conviction hearing pro se and later, again acting pro se, filed an amendment to said petition, it should be noted that by the time of the hearing he was represented by counsel and the record is barren of any acts on the part of defendant's counsel which would indicate that the defendant was not afforded effective and adequate legal advice, counsel and service throughout the entire hearing.

Upon a complete examination of the record we therefore find that the judgment of the circuit court of LaSalle County should be affirmed and that there has been an adequate compliance with Anders v. California, supra. The judgment of the circuit court of LaSalle County is affirmed and we have previously entered an order in this cause authorizing withdrawal of appointed counsel pursuant to his motion praying for leave to withdraw.

Judgment affirmed.



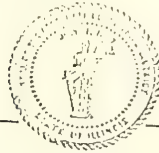


ABST.

72-15

STATE OF ILLINOIS

PEOPLE VS. BILLY DEAN FILIPPO



APPELLATE COURT. THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at  
Ottawa, on the 1st Day of January in the Year of our Lord  
one thousand nine hundred and seventy-two, within and  
for the Third District of Illinois:

Present— + FC

HONORABLE ALLAN L. STOUDEER, Presiding Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on  
SEPTEMBER 22, 1972 \_\_\_\_\_ the Opinion of the  
Court was filed in the Clerk's Office of said Court, in the  
words and figures following, viz:



IN THE APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Rock Island County.
	)	
vs.	)	
	)	
BILLY DEAN FLIPPO,	)	Honorable
	)	Richard Stengel,
	)	Presiding Judge
Defendant-Appellant.	)	

Abstract

PER CURIAM.

The defendant, Billy Dean Flippo, was indicted for the crime of burglary. On October 13, 1971, he appeared in the circuit court of Rock Island County and entered a plea of guilty to the charge contained in the indictment. Thereafter the defendant was sentenced to a term of imprisonment of not less than one nor more than five years.

On August 23, 1972, Bruce Stratton of the Illinois Defender Project filed a motion for leave to withdraw and a brief in support thereof pursuant to Anders v. California, 386 U. S. 738. The substance of the motion of counsel for the defendant was that an appeal would be wholly frivolous and could not possibly be successful. We have therefore examined the record completely in this cause and after such an examination agree that such an appeal would be entirely frivolous and there could be no successful challenge raised regarding the indictment, the sentence, or any proceedings which transpired during the defendant's appearance in court.

It is suffice to say that no challenge can be raised regarding



an indictment if it subsequently enables the defendant to prepare his defense and if it would also bar any future prosecution for the same offense. See Miller v. Pate, 42 Ill. 2d 283, 246 N.E. 2d 225. The indictment in this case stated the name of the offense, the statutory citations, the nature and elements of the offense, the time and place of the offense, and the name of the defendant. It was signed by the foreman of the Grand Jury. We can only conclude that these details served to inform the defendant of the crime with which he was charged and it further protected him against double jeopardy. The indictment also meets the requisites of the Illinois Criminal Code as contained in Chapter 38, Section 111-3, Illinois Revised Statutes.

The sentence imposed upon the defendant was not the result of negotiation between defense counsel and the State and was substantially less than the five to fifteen year sentence which was recommended by the State. The sentence received by the defendant in this case certainly cannot be considered unreasonable in that the sentence was minimal as far as the term of one year was concerned and we find no basis in the record which could present a sound argument for the reduction of the five year maximum sentence imposed. We can only conclude that the defendant received a reasonable sentence which meets the indeterminate requirements of sentencing as required by statute and recommended by the standards of the American Bar Association.

A further review of the record discloses that the defendant was personally in open court, that he was advised of the nature of the charge against him, that the prosecution then stated the factual basis for said charge and that the defendant admitted that the facts as stated by the prosecution were true in that he did unlawfully enter certain named premises with the intent to commit a theft. The minimum and maximum sentence prescribed by law was further explained to the defendant and he was advised



that he had a right to persist in his plea of not guilty should he not desire to enter a plea of guilty to the charge. The record further discloses that the defendant was advised of his right to remain silent, his right to be present at all times in court for the purpose of confronting and cross examining State witnesses, and for the further purpose of offering evidence in his own behalf. After a careful review of the record we can only conclude that the defendant received all of the safeguards and requirements as set forth in Supreme Court Rule 402.

Lastly, the defendant after being advised as to his right to a hearing in mitigation and aggravation of sentencing personally waived said hearing and therefore we conclude that all the requirements of Anders v. California, supra, were complied with.

We have heretofore entered an order in this cause authorizing the withdrawal of appointed counsel pursuant to the motion to withdraw and we further find that the judgment of the circuit court of Rock Island County should be affirmed.

Judgment affirmed.





## STATE OF ILLINOIS

## APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE HAROLD F. TRAPP, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

---

BE IT REMEMBERED, that to-wit: On the 20th day  
of September A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



STATE OF ILLINOIS  
IN THE APPELLATE COURT  
FOURTH DISTRICT

---

MARIE BEATRICE HONEY,	)	
	)	
Plaintiff-Appellee	)	
	)	
vs.	)	Appeal from
	)	Circuit Court
JOHN PERRY HONEY,	)	Vermilion County
	)	
Defendant-Appellant	)	

---

MR. JUSTICE SIMKINS delivered the Opinion of the Court.

Defendant-Appellant, John Perry Honey, appeals from a judgment of the Circuit Court of Vermilion County which denied his Petition to Modify the Decree of Divorce entered December 20, 1967, under the provisions of which custody of the minor child, James Honey, was awarded to Plaintiff-Appellee, Marie Beatrice Honey (Jones). Appellant urges that the judgment of the trial court was against the manifest weight of the evidence, an abuse of discretion, that the court failed to give proper weight to the wishes of the child who had become nine years of age a few days prior to the hearing on the Petition and that the trial judge "mis-applied the law governing change of custody by requiring a 'material change in circumstances'".



The record discloses that the Court did consider the child's preference. It is also true that that preference is not controlling. *Barbara v Barbara* 110 Ill.App.2d 189, 249 N.E.2d 269; *Strouse v Strouse* 75 Ill.App.2d 362, 220 N.E.2d 485; *Stickler v Stickler* 57 Ill.App.2d 286, 206 N.E.2d 726. Appellant also argues that *Collings v Collings* 120 Ill.App.2d 125, 256 N.E.2d 108; and *Nye v Nye* 411 Ill. 408, 105 N.E.2d 300 hold that the welfare of the child is the paramount consideration and that the trial judge here relied upon a rigid formula requiring a "Material and Substantial Change of Circumstances". The judge's order, in our view, does not form a basis for this argument. He expressly found "...that there has not been a material change of circumstances to indicate that it would be in the best interest of the child to change his custody....". (Emphasis supplied.) That the trial court had the welfare of the child uppermost in his mind is unmistakably apparent from the record, and the argument in this connection is without merit.

We have examined the record in the light of appellant's contentions. A recital of the testimony would serve no useful purpose, nor would a lengthy opinion have any precedential value. The record establishes that the judgment of the trial judge is not against the manifest weight of the evidence, nor does it support the charge that the failure to allow the Petition was an abuse of discretion, neither do we find any error of law. Accordingly, pursuant to Supreme Court Rule 23, we affirm.

Judgment affirmed.

Trapp, P.J., and Smith, J. concur.



7IA<sup>3</sup> 629

(24540-4M-970) 160 0

## STATE OF ILLINOIS

## APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE IRLAND S. JENKINS, Judge

Att'y: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 20th day  
of September A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:





STATE OF ILLINOIS  
IN THE APPELLATE COURT  
FOURTH DISTRICT

---

MARGARET E. ELDRIDGE,	)	
Plaintiff-Appellant,	)	
vs	)	
JAMES H. ELDRIDGE,	)	Appeal from
Defendant-Appellee	)	Circuit Court
	)	Vermilion County

---

MR. JUSTICE SIMKINS delivered the Opinion of the Court:

On April 16, 1968, the Circuit Court of Vermilion County granted Plaintiff-Appellant Margaret E. Eldridge a divorce from Defendant-Appellee James H. Eldridge. Both parties were represented by counsel, and pursuant to agreement of the parties, custody of the two minor children of the parties was awarded to Plaintiff with child support in the sum of \$25.00 per week. Other details concerning property were also agreed upon and incorporated in the decree.

On August 3, 1971, Plaintiff filed a Petition seeking an increase in child support, and also a determination of the right to claim, on income tax returns, the two children as dependants. Both parties are employed. After hearing the



evidence the trial judge increased the child support by \$5.00 per week and ruled that the defendant was entitled to claim both children as dependants for income tax purposes and this appeal followed.

We have examined the record. It reveals no abuse of discretion on the part of the trial judge, no error of law was committed, an opinion would have no precedential value, and the judgment entered is not against the manifest weight of the evidence heard by the judge. Accordingly, pursuant to Supreme Court Rule 23, we affirm.

Judgment affirmed.

Craven, P. J., and Smith, J. concur.



STATE OF ILLINOIS

—  
APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding JudgeHONORABLE SAMUEL O. SMITH, JudgeHONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

---

BE IT REMEMBERED, that to-wit: On the 20th day  
of September A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



STATE OF ILLINOIS  
IN THE APPELLATE COURT  
FOURTH DISTRICT

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
Respondent-Appellee,	)	
vs	)	
LEROY DEE,	)	Appeal from
Petitioner-Appellant.	)	Circuit Court
		Vermilion County

---

MR. JUSTICE SIMKINS delivered the Opinion of the Court.

The Illinois Defender Project moved to withdraw as defendant's counsel pursuant to the rule of *Anders v State of California*, 386 U.S. 738, 18 L. ed 2d 493, 87 S. Ct. 1396. The record shows proof of service of the motion and brief upon defendant. The motion was continued for sixty days for the defendant to file additional suggestions. None were filed.

On May 5, 1970, defendant-appellant, Leroy Dee, was indicted for the murder of Juanita Duckworth. The Public Defender was appointed. On June 17, 1970, pursuant to negotiations between defendant and his counsel and the State's Attorney, defendant entered a plea of guilty to the lesser included offense of voluntary manslaughter. Probation was denied and following a hearing in aggravation and mitigation he was





sentenced to an indeterminate term of 3 to 8 years in the penitentiary. He did not appeal.

On October 21, 1970, defendant filed, pro se, his Petition for Post-Conviction Relief alleging inadequate representation by counsel, that he was questioned by the police when no attorney was present and that he was denied the right to attend the inquest. Different counsel was appointed, a supplemental petition was filed alleging inadequacy of the trial judge's admonishment at the time the plea was taken. After hearing arguments the court denied Post-Conviction Relief without an evidentiary hearing.

On discharge of our responsibility we have examined the record. It reveals several instances in which defendant, in response to questions by the judge, stated that he was completely satisfied with the legal representation afforded him. The record also establishes a careful adherence to Supreme Court Rule 401 which was then in effect as well as an intelligent, understanding and voluntary plea of guilty entered and accepted in conformity with the constitutional standards set forth in *Boykin v Alabama* 395 U.S. 238, 89 S. Ct. 1709; and *Brady v United States* 397 U.S. 742, 25 L. ed. 2d 747. The statement made to the police was exculpatory since, if believed, clearly established justifiable use of force by defendant, nor does he contend that his right to counsel was not explained to him at the time. In addition, his contentions in this regard, are disposed of by the holding in *McMann v Richardson* 397 U.S. 759, 90 S. Ct. 1441.



We therefore agree that no error was committed in the trial court, and that this appeal is without merit and frivolous. The petition of the Illinois Defender Project to withdraw as counsel for defendant-appellant is allowed and the judgment is affirmed.

Judgment affirmed.

Craven, P. J., and Smith, J. concur.



STATE OF ILLINOIS  
 —  
 APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
 State of Illinois, sitting at Springfield:

PRESENT

\_\_\_\_\_  
 HONORABLE JAMES C. GRAHAM, \_\_\_\_\_ Presiding Judge  
 \_\_\_\_\_  
 HONORABLE SAMUEL O. SMITH, \_\_\_\_\_ Judge  
 \_\_\_\_\_  
 HONORABLE IRVING STOKES, \_\_\_\_\_ Judge

Attest: ROBERT L. CONN, Clerk.

=====

BE IT REMEMBERED, that to-wit: On the \_\_\_\_\_ 23rd \_\_\_\_\_ day  
 of \_\_\_\_\_ August \_\_\_\_\_ A. D. 19\_\_\_\_, there was filed in the office of  
 the Clerk of the Court an opinion of said Court, in words and figures  
 following:



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

FILED

AUG 23 1972

Robert L. Conn, Clerk  
APPELLATE COURT, 4TH DISTRICT

People of the State of Illinois, )  
 )  
Plaintiff-Appellee )  
 )  
vs. )  
 )  
J. T. Darling, )  
 )  
Defendant-Appellant )

Appeal from  
Circuit Court  
Mason County

MR. JUSTICE SMITH delivered the opinion of the court:

The defendant was charged with burglary and theft over \$150. He waived indictment and after a jury trial was found guilty of burglary and theft of under \$150. He was sentenced to one year on the theft charge and for an indeterminate sentence of six to twelve years on the burglary charge. He appeals both convictions and both sentences. He argues (1) that the information is insufficient to support the sentence and is void in





failing to allege ownership, occupancy or possession of the property and (2) if properly alleged, the evidence fails to establish the ownership, occupancy or possession as alleged.

The information charged that the defendant "without authority knowingly entered into a building at the Boat Yard No. 3 at Chatauqua Refuge operated by Lucille Westlake with intent to commit a theft therein. It is contended by the defendant that this insufficiently establishes the ownership of the property as required by *People ex rel. Ledford v. Brantley*, 46 Ill.2d 419, 263 N.E.2d 27. We do not understand that case to overrule *People v. Knox*, 98 Ill.App.2d 270, 240 N.E.2d 426 or *People v. Mosby*, 25 Ill.2d 400, 185 N.E.2d 152, holding that while ownership of the property is essential to an indictment charging burglary that possession or occupancy is sufficient ownership against a burglar. The suggestion that the term "operate" implies no connotation either of ownership, occupancy or possession seems to us to be unwarranted semantical mental gymnastics. In *People v. Boyden*, 7 Ill.App.2d 87, 129 N.E.2d 37, the court had occasion to consider the terms "manager, proprietor, operator, or conductor" and stated that these were not technical terms of art, but were common ordinary, everyday terms having a reasonably well understood acceptance and meaning, and construed the three as synonymous. Indeed, practical common sense suggests



that it is impossible for one to operate a building or a business in a building without having some semblance of legal control, possession or otherwise. We would further point out that the abstract fails to show any motion directed against the information in this case and had one been made and had the defendant's position been correct, the error could have been readily obviated by amendment. The issue should not be before this court.

The second point that the evidence fails to show that Lucille Westlake had any legal interest in the operation of this building other than as a wife of one of the partners is sound and is supported by the evidence in this record. It appeared clearly that this concession was operated by her husband and another man as a partnership and while she had the right to enter the building and assisted in the operation, yet nevertheless the record fails to disclose any control on her part in the ownership, possession, or occupancy of the building. There is no question but that in Illinois the proof must conform to an essential allegation of an indictment or information charging burglary and such allegation must be proved as laid in order to safeguard against double jeopardy. People v. Walker, 7 Ill.2d 158, 130 N.E.2d 182; People v. Mosby, 25 Ill.2d 400, 185 N.E.2d 152. Once again the abstract fails to disclose that this question was ever



raised or presented to the trial judge and once again, the issue could well have been settled in the trial court on a motion for directed verdict.

Accordingly, this case must be reversed and remanded to the trial court on the burglary charge. The issue of whether or not the two sentences were proper has become moot as the defendant has served out his term on the theft charge before this case was argued in our court. Accordingly, it is ordered that on the theft charge the defendant be discharged and on the burglary charge that this cause be reversed and remanded for such further proceedings as may be deemed appropriate.

Reversed and remanded on the burglary charge.  
Defendant discharged on the theft charge.

Craven, P.J. and Simkins, J. concur.



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 23rd day  
of August A. D. 1972, there was filed in the office of  
modified by supplemental opinion October 30, 1972, is  
the Clerk of the Court an opinion of said Court in words and figures  
following:





General No. 11528

nda No. 72-14

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

FILED

OCT 30 1972

Robert L. Conn, CLERK  
APPELLATE COURT-THIRD DISTRICT

People of the State of Illinois, )

Plaintiff-Appellee )

vs. )

J. T. Darling, )

Defendant-Appellant )

Appeal from  
Circuit Court  
Mason County

SUPPLEMENTAL OPINION

MR. JUSTICE SMITH delivered the opinion of the court:

More than 21 days after the original opinion was filed in this cause, the defendant filed a petition for leave to file a delayed petition for rehearing. The reasons assigned for filing such a request are inadequate and contrary to the precise time limits stated in Rule 367. (Ill. Rev. Stat. 1971, ch. 110A, par. 367.) The petition for leave to file is accordingly denied.

However, such petition was filed before the mandate of this court issued and we still have jurisdiction of the



case. The petition submitted with the motion points out that the order remanding the case to the trial court would per se raise questions of constitutional dimensions in that the defendant on appeal requests not a new trial but a reversal on the grounds of double jeopardy. Accordingly, this court on its own motion has reconsidered its opinion in this cause and now holds that the burglary conviction cannot stand and must be reversed. Otherwise, the defendant is placed in double jeopardy contrary to the provisions of section 3-4 (b) (1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 3-4 (b) (1)) which provides:

"A prosecution is barred if the defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3-3 of this Code \* \* \*."

A successful prosecution for a criminal act requires an indictment, information or complaint charging the defendant with every essential element of the precise crime charged with proof beyond a reasonable doubt supporting every material element of that crime. The consequences of a failure to meet this test was ably and thoroughly discussed in People v. Brown, 99 Ill. App.2d 281, 241 N.E.2d 653. In that case there was



failure on the part of the State to prove an essential element of the offense and the court there held that on appeal the State was not entitled to a second chance to rehabilitate its case at the expense of the defendant's right to acquittal on the evidence which the State did see fit to present. Likewise on the record in this case, the defendant was tried and convicted on an information that charged him with no crime, on an information that the State could not and did not prove. On the record before us, there is a fatal variance between the charge and proof. In People v. Brown, at p. 293, the court said:

"Defendant in this case exercised his constitutional right to appeal his conviction and, in so doing, he did not ask for a new trial. Having succeeded in establishing in this court that the trial judge should have acquitted him for failure of the State to prove its case, the defendant should be in no worse position than he would have been if he had been properly acquitted at the time of the trial. We believe that it would be within our authority to reverse and remand with direction to enter a judgment of acquittal, but the legal effect would be the same as that accomplished by a simple reversal here."

We regard the reasoning in Brown as controlling.

Accordingly, the judgment of the trial court entered on the burglary charge is reversed. The judgment of conviction on the theft charge has become moot since the defendant has served the sentence imposed thereon.

It is therefore ordered that the conviction for burglary shall be and the same is hereby reversed, that the



mittimus heretofore issued out of the circuit clerk of  
Mason County shall be and it is hereby modified and that  
our mandate issue in due course and upon the service thereof  
upon the warden of the penitentiary, the defendant shall be  
forthwith discharged.

Craven, P.J. and Simkins, J. concur.





STATE OF ILLINOIS

ABST.

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding JudgeHONORABLE SAMUEL O. SMITH, JudgeHONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 22<sup>nd</sup> day  
of August A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

---

People of the State of Illinois,	)	
	)	
Plaintiff-Appellee	)	Appeal from
	)	Circuit Court
vs.	)	Adams County
	)	
Samuel Black,	)	
	)	
Defendant-Appellant	)	

---

MR. JUSTICE SMITH delivered the opinion of the court:

The Illinois Defender Project moved to withdraw as defendant's counsel and accompanied the motion with a brief in conformity with *Anders v. State of California*, 386 US 738, 18 L.Ed 2d 493, 18 S Ct 1396. The record shows proof of service on the defendant of the motion and its accompanying brief. The motion was continued for 60 days for the defendant to file any further or additional suggestions. He directed a letter to this court charging in essence that parties had



lied to the authorities in Adams County over a period of 15 to 20 years to protect themselves and thus had created a prejudice against him, and apparently suggests that this is an additional reason for relief in this court. There is nothing in the record before us suggesting or establishing the proof of these assertions.

The defendant was indicted in three counts: (1) asserting rape upon one Charlotte Coram, (2) taking indecent liberties with that child by performing an act of sexual intercourse with her, and (3) taking indecent liberties with the same child by lewdly fondling her. The child was less than ten years old at the time of the occurrences. Counsel was appointed and the defendant entered his plea of guilty to Count II of the indictment and was sentenced by the court for a period of not less than six nor more than fifteen years. The record establishes a full and complete admonition by the court of all of the defendant's constitutional and statutory rights in a meticulous manner and there is no room for doubt but that he was adequately admonished and understood the nature of the crime. Upon acceptance of the plea, a pre-sentence report was prepared and presented to the defendant, and a hearing in mitigation and aggravation was conducted.



Two doctors testified to the physical condition of the little girl and the condition of her privates and a witness testified in aggravation and mitigation in having observed and witnessed an act of sexual intercourse on the part of this defendant with the victim on at least two occasions.

In view of this record, we are constrained to agree with the public defenders who had represented this defendant on appeal that there is no justiciable issue for this court to review and that a full-blown review would be frivolous. There is no evidence in this record sustaining the charge of perjury which would have affected the plea of guilty and no evidence was offered by the defendant in mitigation of the charge. The appeal is devoid of merit and frivolous.

Accordingly, the petition of the Illinois Public Defender Project to withdraw as counsel for the defendant-appellant is allowed. The judgment of the trial court is affirmed.

Judgment affirmed.

Craven, P.J. and Simkins, J. concur.





STATE OF ILLINOIS  
—  
APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge  
HONORABLE SAMUEL O. SMITH, Judge  
HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

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BE IT REMEMBERED, that to-wit: On the 17th day  
of OCTOBER A. D. 19 72, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

General No. 11630

Agenda 72-105

Estel H. Fultz,

Plaintiff-Appellant,

vs.

William J. Graven, Pearl Graven and  
Irene Loy Reedy,

Defendants-Appellees.

}  
Appeal from  
Circuit Court  
Moultrie County

---

MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

The plaintiff appeals a decision of the circuit court of Moultrie County denying specific performance sought under the terms of a certain lease-option agreement.

Plaintiff entered into a lease with the defendants Graven for a certain tract of land. By the terms of the lease plaintiff was to take possession as soon as certain 1965 crops were harvested and was to make rental payment of \$825 on or before March 1, 1966 and each year thereafter. Plaintiff was also obligated to pay any increase in taxes over those which were paid in 1963. The plaintiff acquired an option to purchase the leased tract together with two other tracts of land subject to certain terms and conditions. The option was set out in the lease.

There is much evidence in this record with reference to ancillary matters and with reference to the negotiations between

---



the parties with reference to abstracts and matters of mineral rights and other issues which we deem irrelevant to the issue on appeal.

Plaintiff did not take possession of the land in accordance with the terms of the lease nor did he pay the annual rental nor the increase in taxes. He asserts that his failure to do so was the fact that the defendants Graven had a tenant on the farm thereby making the plaintiff's possession impossible. The evidence is clear that the defendants Graven had received from Reedy an offer to purchase the two tracts which were subject to the option. By the terms of the option, in the event of an offer to purchase, the plaintiff was to be given notice of such offer to purchase and was then required to exercise his option within a 30-day period thereafter.

We agree with the appellant that the consideration recited in a lease will support an option to purchase contained in that lease. See 24 ILP, p. 351 and Cities Service Oil Co. v. Viering, 404 Ill. 538, 89 N.E.2d 392.

In Sweeting v. Campbell, 8 Ill.2d 54, 132 N.E.2d 523, the Illinois Supreme Court discussed the remedy of specific performance and in the course of that discussion noted that specific performance is not a matter of right even where the contract is clear and unambiguous, but the remedy in each instance rests in the sound discretion of the court to be determined from all of the facts and circumstances. Such discretion, of course,



being judicial discretion cannot be arbitrarily or capriciously exercised but must be exercised after a consideration of all the circumstances of the particular case. Thereafter, in Laegeler v. Bartlett, 10 Ill.2d 478, 140 N.E.2d 702, the court noted that the main question in a proceeding for specific performance was whether the complainant had made a conscientious effort to comply honestly with the terms and conditions of the contract sought to be specifically enforced.

Thus, in our review of this case we must determine whether the denial of the remedy of specific performance under the facts and circumstances constituted an abuse of discretion. We hold that this record does not establish an abuse of discretion.

The plaintiff in this case did not fulfill the obligations that he undertook pursuant to the terms of the lease. He did not take possession. He did not pay the rental payments provided for. Nor did he pay any increase in taxes over those which were paid in 1963. While it is true there are some extenuating circumstances with reference to the taking of possession, it is also true that plaintiff undertook no course of action to put himself in a position to acquire possession and certainly made no efforts to make the required payments and indeed all of the activity seems to have been undertaken by the plaintiff subsequent to the receipt of an offer of purchase by the Gravens.

Since we can find no abuse of discretion in the denial of specific performance in this case, but rather again find a strong evidentiary basis for the action of the trial court in denying





specific performance, the judgment of the circuit court of Moultrie County should be, and the same is, affirmed.

JUDGMENT AFFIRMED.

SMITH and SIMKINS, JJ., concur.



7IA<sup>3</sup>704

(24540—4M—9-70) 160.0

## STATE OF ILLINOIS

## APPELLATE COURT

**ABST.**

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 17th day  
of October A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

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People of the State of Illinois,	)	
	)	
Respondent-Appellee	)	
	)	
vs.	)	Appeal from
	)	Circuit Court
Harvey Lee Guthrie,	)	Coles County
	)	
Petitioner-Appellant	)	

---

MR. JUSTICE SMITH delivered the opinion of the court:

The Illinois Defender Project moved to withdraw as defendant's counsel and accompanied the motion with a brief in conformity with Anders v. State of California, 386 US 738, 18 L ed 2d 493, 87 S Ct 1396. The record shows proof of service on the defendant of the motion and its accompanying brief. The motion was continued for 60 days for the defendant to file any further or additional suggestions. None were filed.

The record shows that the defendant was originally charged with attempted murder and aggravated battery committed



against his wife. On June 3, 1968, the defendant pleaded guilty to the charge of attempted murder and in July, 1968, was sentenced to a minimum of two and a maximum of seven years after denial of probation. The defendant is now on parole and living in Crystal Lake, Illinois.

The pending appeal in this court originates from the denial of a post-conviction petition following an evidentiary hearing in the trial court on May 5, 1971. The defendant was represented by competent counsel on this hearing. The allegations of the post-conviction petition alleged (1) that in the original proceedings the public defender was inadequate; (2) that his counsel coerced the plea of guilty; (3) that he failed to move to withdraw the previously made guilty plea; (4) failed to inform the court that the defendant wished other counsel; (5) was not informed that he had a right to counsel other than the public defender and the State's Attorney misrepresented this right; and (6) the State's Attorney coerced him into pleading guilty by threatening "ten to twenty".

None of these charges are borne out by the record either factually or as a matter of law. The defendant testified "No, I was not going to say I did not hurt her, I blacked her eye. I did this. I broke her skin on her shoulder with a knife. I wasn't trying to kill her". He was asked "Did you feel you were guilty of aggravated battery?" Answer: "I'd





struck my wife, yes. I did that". He also testified that he would have pleaded guilty to that and would have "had to be satisfied". It is clear from the record that the plea admonitions were full and complete and that there is no basis for a charge of coercion of a plea. Defendant's allegation that he desired other counsel is denied by his counsel on the hearing. There is no showing that defense counsel erred in failing to withdraw the guilty plea or that his conduct was not within the realm of proper trial tactics.

The Illinois Defender Project states that they find nothing that constitutes the violation of a substantial constitutional right. They have properly discussed every conceivable question on this record and find that either the facts or the law do not support the allegations of the petition or reflect a violation of any constitutional rights. We agree. There being no error shown, a further review of this case on appeal would be an idle gesture and futile.

Accordingly, the petition of the Illinois Defender Project to withdraw as counsel for the defendant is allowed and the judgment of the trial court is affirmed.

Judgment affirmed.

Craven, P.J. and Simkins, J. concur.



7IA<sup>3</sup>706

(24540-4M-9-70) 160-a

STATE OF ILLINOIS

APPELLATE COURT

ABST.

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 17th day  
of October A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

---

People of the State of Illinois,	)	
	)	
Plaintiff-Appellee	)	Appeal from
	)	Circuit Court
vs.	)	Macon County
	)	
Albert Heaton,	)	
	)	
Defendant-Appellant	)	

---

MR. JUSTICE SMITH delivered the opinion of the court:

The Illinois Defender Project moved to withdraw as defendant's counsel and accompanied the motion with a brief in conformity with *Anders v. State of California*, 386 US 738, 18 L ed 2d 493, 87 S Ct 1396. The record shows proof of service on the defendant of the motion and its accompanying brief. The motion was continued for 60 days for the defendant to file any further or additional suggestions. The defendant replied by letter that he was sick and worried about his family at the time his plea was entered - a matter not shown of record - but requests us to review the record and determine if there is any way to get this guilty plea off his record as he doesn't want to live with it the rest of his life.

The record shows that the defendant was charged by information with the offense of forgery for issuing a check



of \$68.20, after stealing a check of Ralph Moery and signing his name without authority. The record shows that the defendant made the check out payable to himself and cashed it at a filling station. He then departed for Kentucky and was living there at the time of his apprehension. The defendant is 43 years old and was represented by counsel. The record shows full admonishment on the part of the court as to the waiver of indictment and all other matters required by law. A written jury waiver was signed.

In addition, the record shows there was a plea agreement made and preserved in the record. The terms of the agreement were that he would plead guilty, ask for probation, that the State would abide by the recommendation of the Probation Officer and if probation was denied, would recommend a sentence of one to five years. The probation report recommended that probation be denied. It was denied, and the sentence of one to five years was imposed as the State had recommended.

In view of this record, we are constrained to agree with the Illinois Defender Project that there is no justiciable issue for this court to decide and that a full-blown review is unwarranted and futile.

Accordingly, the petition of the Illinois Defender Project to withdraw as counsel for the defendant is allowed and the judgment of the trial court is affirmed.

Judgment affirmed.

Craven, P.J. and Simkins, J. concur.





## UNITED STATES OF AMERICA

ABST.

State of Illinois )  
Appellate Court ) ss:  
Second District )

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice  
Honorable THOMAS J. MORAN, Justice  
Honorable WILLIAM L. GUILD, Justice  
HOWARD K. KELLETT, Clerk  
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

October 20, 1972 the Opinion of the Court was filed in  
the Clerk's office of said Court, in the words and figures  
following, viz:



FILED

1 OCT 20 1972

No. 72-2

HOWARD K. KELLETT, Clerk  
Appellate Court, 2d District

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

Abstract

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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the 19th Judi-
v.	)	cial Circuit, Lake
	)	County, Illinois.
ANTHONY J. D'AMORE,	)	
	)	
Defendant-Appellant.	)	

---

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant Anthony J. D'Amore was convicted of disorderly conduct (Ill.Rev.Stat. 1969, ch.38,sec.26-1(a)(1)), and of resisting or obstructing a police officer (Ill.Rev.Stat. 1969, ch.38,sec.31-1). He was sentenced to 15 days in the county jail. On appeal he contends the cases should have been dismissed on his pre-trial motion; that he was not proved guilty beyond a reasonable doubt; and that the sentence is excessive.

Both charges arose in connection with defendant's visit to his former marital home on January 10, 1971. An intermediary who accompanied the defendant inquired from Jennie D. D'Amore if defendant could see his children. Upon her refusal, defendant drove away but was shortly stopped by police officers who requested that he return to the house. There was evidence that the defendant returned voluntarily; but that when the officers attempted to settle the visitation problems, defendant became very agitated and used abusive and vile language in the presence



of Mrs. D'Amore and the D'Amore children and the police; and also threatened physical harm to a male friend of Mrs. D'Amore who was present. The officers testified that the children became terrified and that after several warnings they placed defendant under arrest for disorderly conduct; and that when he refused arrest and attempted to strike one of them while handcuffs were being applied, they charged him with resisting arrest.

Initially, defendant argues that his pre-trial motion to dismiss based upon his theory that the officers had no right to intervene in a family matter which properly should have been in the divorce court, was erroneously denied. However, defendant has shown no jurisdictional ground for the dismissal. There was no basis for the dismissal pursuant to the grounds set forth in the Statute (Ill.Rev.Stat. 1969, ch.38,sec.114-1). The court properly submitted the charges to the jury. See People v. Long (1970), 126 Ill.App.2d 103, 106.

Defendant has argued that conduct which he claims was provoked by unauthorized intervention by the police, cannot be properly charged as disorderly conduct. He cites City of Chicago v. Wender (1970), 46 Ill.2d 20. However, in Wender the defendant merely asked in "loud" tones why he and his passengers were being "frisked" after a traffic offense. The response to unusual action on the part of the police was not unreasonable. Here, the jury could have determined from the testimony that the loud, abusive and vile language, including the threat to a party to the discussion, constituted a knowing act which was unreasonable and disturbing, provoking a breach of the peace.

Defendant further argues that the resisting charge was erroneous because the movement of one of defendant's arms toward the officer when the handcuff was applied to his other hand was merely an unintentional "reaction" to an illegal arrest. There was evidence



however from which the jury could conclude that defendant resisted one whom he knew to be a peace officer authorized to make an arrest. These facts support the charge even if it were to be assumed that the arrest for disorderly conduct was unauthorized. People v. Ill.App., Carroll (1971), 272 N.E.2d 822, 824; People v. Shinn (1972), <sup>5 Ill.App.3d 468,</sup> 283 N.E.2d 502, 504-505. See also Ill.Rev.Stat. 1969, ch.38, sec.7-7.

We conclude that defendant was properly found guilty of both charges by proof beyond a reasonable doubt.

Defendant's further contention that the trial court failed to order a pre-sentence investigation or conduct a hearing in aggravation and mitigation is inconsistent with the common law record. The court ordered that the probation hearing be held at the time judgment was entered upon the verdict. There is a memorandum from the probation officer stating that no interview was conducted because defendant would not fill out a probation application worksheet and was abusive and uncooperative. The clerk's docket shows that a motion for probation was heard and denied on the sentencing date. The record is not otherwise contradicted and therefore belies defendant's contention.

While we do not find a basis for reversal, we are nevertheless persuaded on this record that the defendant should not have been placed in the position from which his conduct, reprehensible as it was, arose. The police officers were not justified in suggesting that defendant return after he had left the area. Their resulting interference in a civil matter was wrong under the circumstances. Considering the unusual facts, we will reduce the sentence to 2 days in the county jail with the recommendation that the sentence be served upon a week-end.

Judgment of conviction affirmed, sentence modified.

Thomas J.  
/MORAN and GUILD, J.J. concur.





No. 71-226 )  
No. 72-110 ) Consolidated

7 I.A. 3 748

HOWARD K. KELLETT, Clerk  
Appellate Court, 2d District

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
RAYMOND GORDON BLADES, )  
 )  
Defendant-Appellant. )

Appeal from the Circuit  
Court for the 17th Judi-  
cial Circuit, Winnebago  
County, Illinois.

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant's direct appeal from his conviction of burglary has been consolidated with his appeal from the denial of a post-conviction petition. In the direct appeal from the burglary conviction he contends that his negotiated plea was invalidated by his contemporaneous but separate plea to possession of marijuana (later vacated in a habeas corpus proceeding based on People v. McCabe (1971), 49 Ill.2d 338 ). He claims denial of effective assistance of counsel as the basis for reversing the order denying him post-conviction relief without a hearing.

In the post-conviction proceedings the court below first granted, then later denied, defendant's motion for a substitution of judge. The denial was based upon the erroneous belief of the court that a post-conviction petition must be heard before the judge who enters the judgment of conviction. (See People v. Wilson (1967), 37 Ill.2d 617, 621.) The court also dismissed the post-conviction petition on the erroneous ground that direct



appeal must first be pursued to conclusion. The post-conviction act does not contain this restriction. (Ill.Rev.Stat. 1969, ch. 38, sec. 122-1, et seq.) Further, there is authority that both the direct appeal and the post-conviction appeal may be heard in the same proceedings on review. (See e.g. People v. Moore (1969), 42 Ill.2d 73, 79.) Appointed counsel failed to argue the substitution motion and failed to object to the dismissal. The State has confessed error.

Therefore the order denying the post-conviction petition is reversed and cause 72-110 is remanded for further proceedings thereon.

However, we affirm the judgment of conviction of burglary (71-226).

While the pleas to both the burglary and the marijuana possession were taken on the same date, they were based upon separate indictments. The court first admonished defendant as to the burglary plea, accepted the plea, and sentenced defendant to 2-5 years. He then proceeded similarly as to the marijuana plea, sentencing defendant to 2-5 years. The sentences were adjudged to run concurrently.

The record shows a full compliance with Supreme Court Rule 402. (Ill.Rev.Stat. 1971, ch. 110A, sec. 402) Defendant does not dispute this but argues that the plea to the marijuana indictment which was later invalidated necessarily "tainted" the proceedings so that the plea to the burglary charge was not therefore knowingly and voluntarily made.

In People v. La Frana (1954), 4 Ill.2d 261, 263, the defendant was convicted of murder on the basis of a confession later established to be coerced. Prior to the reversal of the murder case, defendant had pled guilty to a robbery charge growing out of a separate instance. He argued on post-conviction that the plea to robbery was indirectly coerced because he entered the plea only because he had already received a maximum sentence on the murder conviction and the robbery sentence was to run concurrently. The



court held that the defendant's motive for his plea was not a basis for setting it aside when it was knowingly and voluntarily made.

Similarly, a defendant's fear that statements might be admitted in violation of his constitutional rights, his fear of a possible death penalty, or a desire to limit the possible penalty, all have been held insufficient to invalidate an otherwise knowing and intelligent plea to a lesser included offense.

See e.g. North Carolina v. Alford (1970), <sup>400 U.S. 27, 31,</sup> 27 L.Ed.2d 162, 168, <sup>91 S.Ct. 160, 164</sup> ✓  
McMann v. Richardson (1970), <sup>379 U.S. 759, 772,</sup> 25 L.Ed.2d 763, 774, <sup>90 S.Ct. 1441, 1449;</sup> ✓ People v.  
Goodwin (1971), 50 Ill.2d 99, 102, 103; People v. Sephus (1970), 46 Ill.2d 130, 132.

Defendant has cited our decision in People v. Wylie (1971), 2 Ill.App.3d 720, but it is not analogous. In Wylie, the defendant was convicted of two charges in the same trial. The subsequent voiding of the charge of sale of marijuana to a minor prevented defendant from having received a fair trial on the remaining charge of the sale of LSD. The issue was one of fair trial and has no application to the challenge to the plea here.

Appeal 71-226 affirmed; post-conviction appeal 72-110 reversed and the cause remanded with directions.

Affirmed in part; reversed in part, and remanded with directions.

Thomas J.  
/ MORAN and GUILD, J.J. concur.





55064

1 7 I.A.<sup>3</sup> 786

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	
v.	)	COURT OF COOK COUNTY
	)	
FRED R. CASSMAN,	)	Hon. Felix M. Buoscio,
	)	Presiding.
Defendant-Appellant.	)	

ABST.

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendant was indicted for theft by deceptively obtaining control over another's property in four separate indictments. The four indictments were consolidated for trial, and a jury found defendant guilty of theft on all four charges. The court sentenced him to a term of two to five years on each count, the four sentences to run concurrently. On appeal defendant contends that, as to two of the indictments, the court erred in denying his motion to suppress the identification testimony; that, as to one indictment, there was a fatal and prejudicial variance between the State's bill of particulars and the testimony of the State's witnesses; and that the court erred in denying defendant's motion for a directed verdict as to one of the indictments. Defendant also argues that the court erred in instructing the jury, and that the sentences imposed were excessive.

The stolen property consisted of thousands of phonograph records, all of an album known as "The Singing Nun." Mercury Records, the producer, had given several hundred thousands of the records to various charitable organizations. As a result of the gift from Mercury, the various complaining witnesses came into possession of a large number of the records.

Sister Mary Angelo testified for the State that she was assigned to Holy Angel's Parish in Chicago. Over a period of ten days, she received four telephone calls from defendant. Purporting to represent various charities, he agreed to purchase the Singing Nun records for 50 cents apiece. Sister Mary Angelo further testified that on April 19, 1966, between 5:00 and 7:00 p.m., defendant came and took the records. The witness assisted defendant in loading the records. The parish never received any money for the







records.

Sister Mary Theogene, Principal of Immaculate Conception School in Chicago, testified for the State that she received three telephone calls from defendant purporting to represent a charity and offering to buy their records. After they agreed on a price, defendant, on April 8, 1967, at about 10:00 a.m., came to the school and took nearly 3500 records. Sister Theogene conversed with defendant while students helped load the records. She prepared and received a receipt from defendant for the records, and that receipt, introduced into evidence by the State, was signed by defendant with a fictitious name. The school never received any money from defendant.

Sister Mary Columba, Principal of Mercy High School in Chicago, testified at trial for the State that on April 3, 1967, she received a telephone call from defendant offering to buy their records in behalf of the Boy Scouts. They agreed on a price of 50 cents a record, and that afternoon at about 1:00 p.m., defendant came to school and took the records. Sister Mary Columba and some students helped load the records. Defendant left when the vehicle was full, and was to return later for the remaining records.

Sister Emily Mary, the assistant Principal of Mercy High School, testified that defendant returned to the school at about 3:00 p.m. on the same day and took the remaining records. He signed a receipt for 1700 records, prepared by the witness and introduced by the State. He signed the receipt under the fictitious name of "Ed Nelson." Defendant never paid any money for the records.

Mrs. Joan Walsh, cashier for the King Car Wash in Chicago, testified for the State that the car wash had purchased 2,000 of the Singing Nun records from Mercy High School, and had sold nearly half of them over a two year period. On April 21, 1967, defendant came to the car wash, identified himself as a representative of the Boy Scouts, and agreed to buy the remaining records at one dollar apiece. In a telephone conversation later that day, Mrs. Walsh advised defendant that there were 1,000 records available, and that they would be cleaned and set out in the car wash. Defendant, after



first stating that the records would be picked up by Boy Scout parents, then stated that he would pick them up himself. Mrs. Walsh prepared a receipt, and left it to be signed. When she returned to work the next morning the records were gone. She received a receipt signed "Ed Nelson."

Anthony Klockowski, whose identification testimony was suppressed by the court, testified that he was employed by the car wash. On April 21, 1967 at about 7:00 p.m., he helped a man load the records into a station wagon. The man signed the receipt for the records.

Defendant presented an alibi defense, and offered alibi testimony for each of the four dates.

Defendant's first contention, addressed to two of the four indictments, is that the trial court erred in denying defendant's motion to strike certain identification testimony. He argues that the identification testimony of Sister Mary Theogene concerning the Immaculate Conception School theft, and that of Sister Emily Mary concerning the Mercy High School theft, should have been stricken. Prior to trial, the court conducted a hearing on defendant's motion to suppress identification testimony. With reference to the testimony of those two witnesses, the following pertinent evidence was adduced.

Sister Mary Theogene, Principal of Immaculate Conception School, testified that on April 8, 1967, the day of the theft, she conversed with defendant for thirty to forty-five minutes while the records were being loaded in his vehicle. Additionally, she prepared and had defendant sign a receipt for the records he took. She testified that she next saw defendant in her office at the school on May 24, 1967. When Sister Mary Theogene entered her office, defendant was seated with two men she recognized as police officers. She identified defendant as the man who took the records. She also observed defendant in the courtroom subsequently at a preliminary hearing.

Sister Emily Mary, assistant Principal at Mercy High School, testified that she first saw defendant on April 3, 1967, the day



of the theft, at about 3:00 p.m. when he returned to take the second load of records. Sister Emily had been instructed by Sister Mary Columba, the Principal, to prepare and obtain a signed statement from defendant for the records. She typed the statement in her office while defendant stood a few feet from her. Defendant was in her presence about three or four minutes. On May 26, 1967, at school, Sister Mary Columba had selected defendant's photograph from a number shown to her by the police. Sister Emily was called into the principal's office, and was shown the single photograph of defendant already identified by the principal. Sister Emily confirmed that the photograph was of the man who took the records.

At the hearing on the motion to suppress the evidence, defendant testified that Sister Mary Theogene was unsure of her identification at the time of seeing him with the police officers, but that another Sister was more positive and reinforced Sister Mary Theogene's identification.

Defendant maintains that the single viewing of defendant by Sister Theogene and the single photographic identification by Sister Emily were so impermissibly suggestive as to taint their subsequent identifications, thus denying defendant due process of law and rendering their in-court identification testimony inadmissible.

Stovall v. Denno, 388 U.S. 293; Simmons v. United States, 390 U.S. 377. However, it is unnecessary for us to determine whether the pre-trial viewings by the two witnesses in the instant case were grossly suggestive. It is well settled that, even when the pre-trial identification procedure is impermissibly suggestive, the in-court testimony of the identification witness would still be admissible as long as the record clearly reveals that the witness's prior observation of defendant was sufficient to serve as an independent origin for the in-court identification. People v. Nelson, 40 Ill.2d 146, 238 N.E.2d 378; People v. Cook, 113 Ill. App.2d 231, 252 N.E.2d 29. Sister Mary Theogene testified that she talked to defendant for at least 30 minutes while the records were being loaded. She also prepared and received a receipt from defendant. Although Sister Emily Mary was with defendant for a





much shorter time, she testified that she had three or four minutes to observe him. Both witnesses had unusually good opportunities to observe defendant under excellent lighting conditions. The facts clearly reveal an uninfluenced observation of defendant by both witnesses, prior to and independent of the single viewings, adequate to serve as a basis for the in-court identification. The court correctly denied the motion to suppress the identification testimony of the two witnesses.

We find no merit in defendant's next contention that, as to the charge of theft from Holy Angel's Church, there was a fatal variance between the bill of particulars furnished by the State and the trial testimony of Sister Mary Angelo, and that this variance was prejudicial to defendant. Prior to trial, in response to a request by the defense, the State furnished a bill of particulars, alleging that on April 19, 1966 defendant telephoned Sister Mary Angelo and later that same day took the records. At trial, Sister Mary Angelo testified that the theft occurred on April 19, 1966. On cross-examination, she stated that April 19, 1966 was a Friday. Actually it was a Tuesday. Defendant argues that the court erred in not striking her testimony and directing a verdict in his favor, urging that he was prejudiced because he presented an alibi covering April 19, 1966. This argument overlooks the fact that the witness was unshaken in her testimony that the theft occurred on April 19. The mistake in her testimony was the statement that April 19 occurred on a Friday. That discrepancy in her testimony was effectively and thoroughly brought to the attention of the jury by defense counsel. It was the function of the jury, aware of the discrepancy, to determine the credibility of the witness. People v. McAfee, 80 Ill.App.2d 142, 225 N.E.2d 74. In the case at bar, the jury determined that the State's witness was credible, and that resolution was proper. The discrepancy as to the day of the week was too insignificant to render her unworthy of belief. Certainly, it was too minor to warrant striking her testimony.

Defendant's third contention is that, as to the theft from King Car Wash, the court erred in denying his motion for a directed





verdict. He maintains that the evidence of that crime was entirely circumstantial, and could be explained on a reasonable hypothesis consistent with the innocence of the defendant. See People v. Dougard, 16 Ill.2d 603, 158 N.E.2d 596.

However, the evidence was not entirely circumstantial. Indeed, the testimony of Mrs. Walsh, the cashier, was direct as to every element of the crime except as to delivery of the records. She identified defendant and testified in detail as to her transactions with him. She told of his agreement to purchase the records, of his failure to pay for the records, and of his false statements about the purchases being made for charity. She also testified as to her subsequent telephone conversation in which he advised her that he himself would pick up the records. The State offered additional evidence that the records were taken by a man a short time later, and that he signed a receipt prepared by Mrs. Walsh. The State's evidence, both direct and circumstantial, was sufficient to prove defendant guilty of theft from the car wash beyond a reasonable doubt. Because the triers of fact are peculiarly suited to determine credibility, a reviewing court will not substitute its own conclusion, unless the proof is so unsatisfactory as to justify a reasonable doubt of guilt. People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920.

As to the theft from the car wash, defendant also contends that the court erred in refusing to give the following instruction (I.P.I. Criminal 3.02) tendered by defendant:

Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of the defendant. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at your verdict.

You should not find the defendant guilty unless the facts and circumstances proved exclude every reasonable theory of innocence.

The I.P.I. Committee note as to the giving of the second paragraph of the above instruction is that "it should be given only when the proof of guilt is entirely circumstantial." The trial court ruled that the proof submitted was not entirely circumstantial, and submitted only the first paragraph of the instruction to the jury.



This ruling was correct. As we have already observed, part of the evidence as to the theft of records from the car wash was direct, and only the first paragraph of the circumstantial evidence instruction was appropriate for submission to the jury.

Defendant's next contention is that the trial court erred in refusing to give the following alibi instruction:

The Court further instructs you that the defendant has offered in this case what is known in law as an alibi; namely, that the defendant was not present at the times and places of the alleged offenses but was at some other places at the time in question. Such a defense may be considered by you in connection with all the facts and circumstances in this case. If the evidence as to the alibi considered with all the other evidence creates in your mind a reasonable doubt as to the guilt of the defendant, then the defense of alibi entitles him to acquittal. [Emphasis added]

The trial judge refused to give an alibi instruction to the jury containing the last sentence. However, he permitted defendant to tender a modified alibi instruction omitting the last sentence, and gave that modified instruction to the jury.

The trial judge properly refused to give the instruction as tendered. Supreme Court Rule 451 requires that all instructions be simple, brief, impartial and free from argument. The tendered instruction was argumentative, slanted and would serve only to confuse the jury. The court did not err in refusing to give the tendered instruction. Moreover, in giving any alibi instruction to the jury, the trial court was more than fair to defendant. The Committee on Pattern Instructions in Criminal Cases recommended that no alibi instruction be given "because it involves a particular comment by the court on a certain phase of the evidence."

Defendant finally contends that the concurrent sentences of two to five years imposed in the instant case was excessive. The power to reduce sentences should be used with caution, and a sentence imposed by the trial judge, who sees the defendant and is in a far better position to appraise him and to evaluate the likelihood of his rehabilitation than a reviewing court, should not be reduced unless there are substantial reasons for doing so.

People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673; People v. Valentine,



60 Ill.App.2d 339, 208 N.E.2d 595. A reduction of sentence is not sanctioned unless shown by the defendant to be either manifestly excessive or of extreme departure from the underlying rationale for our system of penology. People v. Hobbs, 56 Ill.App.2d 93, 205 N.E.2d 503.

In the instant case, defendant did not commit just one crime, but displayed a pattern of criminal deeds over a period of more than one year. During the hearing in aggravation and mitigation, a conscientious trial judge expressly considered in depth various factors before imposing sentence: the criminal acts in question, the public's right to protection, defendant's background, and the effect of imprisonment on his family. Despite defendant's lack of previous criminal record, we cannot say that the sentences imposed were excessive.

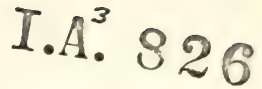
For the reasons stated, the judgment of the circuit court is affirmed.

Judgment affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.







APPEAL FROM THE  
CIRCUIT COURT OF  
COOK COUNTY.

ABS

HONORABLE  
ROBERT A. MEIER, III,  
PRESIDING.

# ABST.

Officer Thomas Walsh of the Chicago Police Department testified that he was assigned to patrol the area near the Cook County School of Nursing. He further stated that on the night in question he heard someone calling for help. He turned and saw two men on top of a man in the snow and a woman standing on the sidewalk nearby. He ran toward the victim and ordered the people to halt, but after a short chase he lost sight of the three suspects. A passing police car was hailed, and Officer Walsh and the





second officer toured the area until they saw the three suspects on the sidewalk in the 2100 block of West Polk Street. Officer Walsh testified that the three suspects denied taking the complaining witness's wallet, but one said, "He fell in the snow." All three were placed under arrest and transported back to the Cook County School of Nursing where the complaining witness identified them as his assailants.

The defendant did not offer any evidence in his own behalf. The court found the defendant guilty with the aforementioned results.

In his petition to withdraw the Public Defender states that the record indicates only two possible issues that could be raised on appeal. These issues are: whether the defendant's identification by the complaining witness was a result of suggestive police procedures, and whether the defendant was proven guilty beyond a reasonable doubt. The Public Defender further argues and concludes in his brief in support of his petition that both grounds are frivolous.

We agree with the Public Defender that the defendant's identification by the complaining witness immediately after his apprehension was justified under the circumstances and, therefore, did not constitute error. The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been generally condemned. United States v. Wade (1967), 388 U.S. 218; Gilbert v. California (1967), 388 U.S. 263. But under certain circumstances these identifications may be justified. People v. Gersbacher (1970), 44 Ill. 2d 321, 255 N.E. 2d 429; People v. Speck (1968), 41 Ill. 2d 177, 242 N.E. 2d 208; People v. Robinson (1969), 42 Ill. 2d 371, 247 N.E. 2d 898; People v. Bey (1969), 42 Ill. 2d 139, 246 N.E. 2d 287. Our courts have also recognized as justified single suspect show-ups where prompt identification is necessary to determine whether defendant was the offender or whether the officers should continue their search. People v. McMath (1970), 45 Ill. 2d 33, 256 N.E. 2d 835. We find that the identification in the instant case was proper. In addition we note that no motion to suppress the identification testimony



was made nor was any objection made to either the in-court or out-of-court identification of the defendant, and any error is, therefore, waived. People v. Fox (1971), 48 Ill. 2d 239, 269 N.E. 2d 720; People v. Miller (1970), 122 Ill. App. 2d 126, 257 N.E. 2d 814; People v. Carter, 270 N.E. 2d 603 (Ill. App. Ct., 1971).

The Public Defender concludes that the second possible issue in this case, whether the defendant was proven guilty beyond a reasonable doubt, is also frivolous. We agree. The complaining witness positively identified the defendant as one of his assailants. The defendant was arrested in the immediate vicinity of the crime shortly after its commission and made an incriminating statement upon his arrest.

It is clear in this jurisdiction that a positive identification by a credible witness is sufficient for a conviction. People v. Soldat (1965), 32 Ill. 2d 478, 207 N.E. 2d 449; People v. Solomon (1962), 24 Ill. 2d 586, 182 N.E. 2d 736. The credibility of witnesses is a matter peculiarly for the trier of fact, and it is not for a reviewing court to substitute its opinion therefor. A reviewing court will not disturb a guilty finding unless the proof is so unsatisfactory or implausible as to justify reasonable doubt as to defendant's guilt. People v. Woods (1963), 26 Ill. 2d 582, 187 N.E. 2d 692. The evidence in this case is not so unreasonable or improbable as to raise a doubt about defendant's guilt.

Upon review of the record, we are convinced that an appeal would be wholly frivolous and without merit, and so the Public Defender's motion is allowed, and the judgment is affirmed.

Judgment affirmed.

DEMPSEY and McNAMARA, JJ., concur.



7 I.A.<sup>3</sup> 828

PEOPLE OF THE STATE OF ILLINOIS, )

Respondent-Appellee, )

Appeal from the Circuit )

v. )

Court of Cook County. )

JOHNNY LEE SPENCER, )

Ben Schwartz, AJ. )

Petitioner-Appellant. )

**ABST.**

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

The petitioner, Johnny Spencer, appeals from a judgment dismissing his petition filed under the provisions of the Post-Conviction Hearing Act, Ill.Rev.Stat., 1971, ch. 38, para. 122-1, et seq.

Spencer, represented by private counsel, pleaded guilty to the charge of murder and was sentenced to a term of 14 to 20 years in the penitentiary. Before accepting his guilty plea, the trial court thoroughly explained to him his right to a jury trial and the penalty that could be imposed for the crime of murder. The court questioned him about his background and education and made sure he understood the consequences of his plea. Spencer said he was guilty and persisted in his plea. Stipulated evidence, including testimony heard by the court at pre-trial motions to suppress his confession and the seizure of incriminating evidence, was then presented.



The evidence disclosed that Spencer climbed through an apartment window about 11:00 P.M. and entered a girl's bedroom. She attempted to scream and he clamped his hand over her mouth. The girl's 14-year-old brother, armed with a knife, accosted the intruder as he fled from the apartment. Spencer wrested the knife away and chased the boy down the hall. The boy fell on a stairway; Spencer kicked him and plunged the knife into his chest.

Spencer threw the knife away. Upon his arrest he was identified by the girl he assaulted; he confessed stabbing the boy and told the police where the knife could be found. He also gave them permission to go to his home and get the blood-stained clothing he wore the night of the murder.

The State recommended a 40 to 80-year sentence. The defendant's counsel pleaded for a lesser penalty. The court, after stating that it was impressed with the attorney's plea, fixed the penalty at 14 to 20 years. Spencer was informed that notwithstanding his plea of guilty he had the right to appeal and if he was without funds counsel would be appointed for him and a free transcript provided. No appeal was taken.

Five months later Spencer filed a pro se petition for post-conviction review. The petition alleged that his attorney refused to appeal his conviction and coerced him into pleading guilty; that he had been beaten by the police, denied counsel before being questioned by them and that his home had been searched without a warrant.







The Public Defender was appointed to represent Spencer in the post-conviction proceedings. The assistant assigned to the case visited him in the penitentiary. A questionnaire containing 38 questions was left with him which was returned with 37 of the questions answered. Based upon the interview, the answers to the questionnaire, the report of proceedings of the trial (which was received in evidence at the post-conviction hearing), and the investigation he had made, the assistant stated that the petition adequately set forth Spencer's contentions and amendments would not be merited.

The State moved to dismiss the petition on the ground that its allegations raised no constitutional question and was insufficient to require a hearing. After a discussion the motion was sustained.

The order of dismissal was appealed to the Supreme Court but transferred here. The Public Defender, who represents Spencer on appeal, has filed a motion to withdraw. The motion, supported by a brief submitted in accordance with Anders v. California, 386 U.S. 738 (1967), states that none of the charges in the post-conviction petition, even if assumed to be true, raised a substantial denial of the petitioner's constitutional rights. The brief concludes that the petition was properly dismissed.



Spencer was notified of the motion to withdraw and a copy of the brief was sent to him. He was informed that he could file whatever points he wished in support of his appeal. In his reply, he states that he is not an attorney and is unable to prepare pro se pleadings, that the Public Defender was negligent in not amending his post-conviction petition, that he is dissatisfied with him and requests a different attorney.

The Public Defender was not remiss in the presentation of Spencer's petition. The assistant consulted with him both in person and by mail, ascertained his grievances and examined the record of the trial proceedings. The sworn pro se petition required no amendment as to form and the assistant determined none existed as to substance. A prisoner cannot complain because his attorney refuses to fabricate fictitious claims or distort those which may be available.

That Spencer's attorney chose not to appeal a judgment entered after a plea of guilty shows no lack of competence and raises no denial of due process of law. The allegation that the guilty plea was coerced because his attorney advised him that he might get a greater penalty by standing on his plea of not guilty and taking a jury trial, and a lesser one by admitting his guilt, does not furnish a substantial basis for the assertion that his



guilty plea was involuntary. Following the advice of one's attorney, whether such advice is good or ill-advised, does not make a guilty plea involuntary. People v. Covington, 45 Ill.2d 105, 257 N.E.2d 106 (1970). Indeed, Spencer did well by following his attorney's advice. Capital was made in the attorney's plea for leniency of Spencer's admission of guilt, cooperation with the police and repentant attitude. The trial judge remarked that he was impressed with Spencer's redemptive qualities, brushed aside the recommendation of the State and imposed a sentence that had for its minimum the least number of years permitted by the law. The allegation that his confession following a beating by police and four or five hours of questioning without an attorney being present was not sufficient of itself to require a hearing. People v. Curtis, 41 Ill.2d 147, 242 N.E.2d 201 (1968). The same is true of the allegation that his home was searched without a warrant. Both points had been raised and denied prior to the trial and it was stipulated at the trial that he consented to the search. Moreover, a voluntary plea of guilty waives all non-jurisdictional errors. People v. Phelps, 51 Ill.2d 35, 280 N.E.2d 203 (1972).

Spencer does not suggest how his petition could have been revised to state a case of constitutional deprivation. Not every post-conviction petition can be amended so as to avoid the legal defects in a petitioner's claim. People v. Goodwin, Ill.App.3d , 284 N.E.2d 430 (1972). In the absence of supporting evidence



that a petition with more meritorious claims could have been prepared, the Public Defender had no obligation to offer amendments and the trial court did not err in dismissing the petition without a full evidentiary hearing.

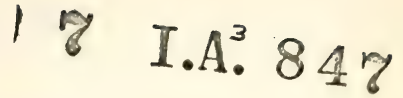
The motion to withdraw is allowed and the order dismissing the petition is affirmed.

Judgment affirmed.

McGloob, P.J., and McNamara, J., concur.







# OF ABST.

Officer Michael Wheeler of the Chicago Police Department



testified that on February 3, 1972, he was working in uniform in a marked squad car when he observed the defendant driving a black Chevrolet station wagon. He testified that he observed the defendant attempt to proceed the wrong way on a one way street and then stop and correct himself. This incident directed his attention to the vehicle, and upon checking the "hot sheet" he determined that it had been reported stolen. Officer Wheeler thereupon pursued the vehicle for approximately one block until the defendant stopped the vehicle and attempted to walk away. The uniformed officer placed defendant under arrest by grasping the defendant's arm and informing him in English of the charge. Because it appeared that the defendant did not understand English, Officer Wheeler asked an informant known to him, who had been in the squad car at the time of this occurrence, to act as an interpreter and explain to defendant in Spanish that he was being arrested for auto theft. The defendant then broke away from the officer and was reapprehended after a one block chase. He also testified that he inspected the vehicle and discovered that the left window had been broken and the ignition had been "tampered with" and that the vehicle bore 1971 Illinois license plate number VG 451L.

The defendant testified in his own behalf, through an interpreter, that on the day of his arrest he came out of a store with his wife when two uniformed officers called him over to a squad car and ordered him into the car. When he hesitated to enter the car, one of the officers struck him on the head with the butt of a gun. Defendant also testified that there was another man in the car at this time whom he did not know but who he assumed was under arrest. He further testified that he knew nothing about a 1960 black Chevrolet station wagon and had not been driving on the day of his arrest. The defendant further stated he had been at work on the 31st of January during the time the alleged theft took place. The defendant presented no further evidence in his behalf, and the court found him guilty with the aforementioned results.

In his brief in support of his motion to withdraw, the



Public Defender presents two reasons why any further appeal of this case would be wholly frivolous.

First, the Public Defender points out that the complaint in this case and the testimony of the complaining witness describe the license number of the stolen vehicle as AG 4511, while Officer Wheeler testified that he observed the defendant driving a vehicle bearing 1971 Illinois license number "Victor George 451L." However, we agree with the Public Defender that any detrimental effect this variance in testimony might have on the State's case is clearly a frivolous ground for an appeal in light of the complaining witness's positive identification of the defendant as the man he saw drive away in his car. A positive identification of the defendant by one credible witness as the man who committed the offense charged is sufficient for a conviction. People v. Soldat (1965), 32 Ill. 2d 478, 207 N.E. 2d 449; People v. Solomon (1962), 24 Ill. 2d 586, 182 N.E. 2d 736. In the instant case the complaining witness saw the defendant in the commission of the offense, and he positively identified the defendant at trial. Therefore, the variance in the testimony as to the license number of the stolen vehicle would not constitute reversible error.

Second, the Public Defender concludes that the argument that the defendant was not proven guilty beyond a reasonable doubt is also wholly frivolous. We agree. It is the duty of the court sitting without a jury to determine the credibility of witnesses and the weight to be given their testimony; and on review, this Court will not substitute its judgment for that of the trier of fact unless the evidence is so improbable and unsatisfactory as to raise a reasonable doubt as to the defendant's guilt. People v. Tensley (1954), 3 Ill. 2d 615, 122 N.E. 2d 155; People v. Coulson (1958), 13 Ill. 2d 290, 149 N.E. 2d 96. In the instant case the defendant denied that he committed the offense and asserted an alibi in defense. However, a conviction will not be reversed merely because the complaining witness is contradicted by the accused. People v. Reynolds, 268 N.E. 2d 545, (Ill. App. Ct., 1971). The credibility





of the witnesses at trial was a matter peculiarly suited to a determination by the trial judge, and we will not substitute our own opinion therefor.

Upon complete review of the record, we are convinced that an appeal would be wholly frivolous and without merit. The motion of the Public Defender is allowed, and the judgment is affirmed.

Judgment affirmed.

DEMPSEY and McNAMARA, JJ., concur.







7 I.A.<sup>3</sup> 358

54393

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
LUIS VEGA, )  
 )  
Defendant-Appellant.) HONORABLE  
RICHARD J. FITZGERALD,  
PRESIDING.

ABST.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Luis Vega was charged with the murder of Marionex Rivera. The jury found him guilty and the court sentenced him to a term of 20 to 30 years. He raised the following points on appeal: (1) the evidence did not prove him guilty beyond a reasonable doubt; (2) the evidence required an instruction and verdict form on the lesser crime of manslaughter; and (3) the restriction of certain testimony anticipated to be given by a treating physician was prejudicial error.

EVIDENCE

Testimony of Elvira Camacho, called by the State:

She and her daughter, Isabelle, went to the Caguas Club with Rivera at about 11:00 o'clock in the evening. They sat at a table four or five feet from the door. The defendant came over to their table and asked Isabelle for a dance. She said "maybe later." He asked a second time and Isabelle gave him the same answer. The witness then danced a couple of dances with the defendant.

Later she was in the rear of the tavern when she saw Rivera come into the tavern with Isabelle. He had a cut on his hand. Fifteen minutes later she heard the first shot and then saw Rivera push Isabelle away from the front door. She then heard five or six more shots. She did not see who fired the shots.

Testimony of Isabelle Camacho, called by the State:

On May 11, 1968, she, her mother and Rivera arrived at the



Caguas Club about 11:00 o'clock. They sat at a table six to ten feet from the door. Shortly after they arrived the defendant approached her and asked her to dance and she told him she wasn't going to. The defendant then asked her mother to dance and her mother accepted. Rivera was at the table during the conversations with the defendant but remained silent.

The defendant returned and asked her to dance and she told him she wasn't going to dance. Then the defendant "started saying that I was a hick and stuff like that because I wouldn't dance. Then after that Warreno [Rivera] told him to leave me alone, that I wasn't going to dance." The defendant then walked away and returned five minutes later and said "I wasn't worth a dollar because I wouldn't dance with him. \* \* \* He grabbed me by my hand, got me off the chair." Rivera, still seated at the table, told the defendant she wasn't going to dance and to leave her alone. Elvira Camacho was dancing at this time. The defendant then walked away and went back to where he was sitting.

About five minutes later the defendant asked Rivera to go outside with him and they left the tavern. She was sitting at the table for about five minutes when she noticed that the defendant and Rivera were fighting outside in front of the tavern. She ran out the door with several other people who separated them. She noted that Rivera had a cut on his left hand at this time but no weapon. The defendant had a knife in his right hand. When the defendant was released by the people holding him he said, "Don't worry, I am going," and walked away. She and Rivera returned to the tavern.

About 15 minutes later Rivera was facing the door and she was standing next to him with her back to the door holding his left hand with her right hand when she heard someone say, "He's coming, he's got a gun." Rivera pushed her to the side and as



she was falling the defendant started shooting. Then some men from outside grabbed the defendant, took the gun and took the defendant outside.

She heard five or six shots fired. Rivera was standing when the first shot was fired and was on the floor when the rest of the shots were fired. She saw a gun in the defendant's hand; Rivera had no weapon in his hand.

She is 22 years old and has known Rivera since she was 12 years old. She had lived with him for seven or eight months. She had nothing to drink and Rivera "had a beer and one that he didn't finish." Following the fight the defendant had bruises on his face. After the fight broke up she doesn't know where the defendant went. Rivera was not standing while all the shots were fired; he was not moving toward the defendant when the shots were fired. She did not see anyone strike the defendant after the shooting. She does not remember stating at the coroner's inquest that when she came out of the tavern and saw the fight Rivera was on top of the defendant.

It was stipulated that the court reporter at the coroner's inquest would testify that the following testimony was given:

Answer by Isabel Camacho: When I was coming out of the tavern and they were fighting outside.

Question by the Coroner: And where was Mr. Rivera?

Answer by Isabel Camacho: He was on top of him.

Testimony of Alex Cichowski, a policeman, called by the State:

At 12:30 or 12:45 A.M. the defendant approached his police car and said, "I just shot a man at 1025 California." The defendant had a few bruises on his face at the time. He searched the defendant and finding no weapons, put him in the back seat of the squad car. When he got the defendant to the station he noticed the defendant's face was bruised and he was black and blue





around both eyes. In his opinion the defendant was not seriously injured at that time.

Testimony of Victor Medina, called by the defense:

He is the bartender at the Caguas bar. Prior to that he was a bartender for the defendant; he had known Rivera for about six years. The defendant had been in the Caguas on the morning of the day in question, came in again in the afternoon and returned at about 11:00 o'clock in the evening.

Rivera first came into the tavern about 8:00 or 8:30 P.M. with two ladies and had two or three drinks. He saw the defendant dancing with Elvira Camacho. Later the defendant took money out of his pocket and paid the witness for the drinks and \$5 he owed him. He saw that the defendant had "plenty money." On cross-examination he stated that defendant paid him the \$5 in the morning.

Later he was putting another man out of the tavern and when he got to the front door he saw the defendant on the ground and heard Hilda Ortiz say, "Kill him." Hilda was kicking the defendant and the deceased was on top of the defendant with a knife in his hand. The knife had a black handle which was five or six inches long. He tried to stop the fight, but Hilda told him to get inside the bar and take care of the cash register. The defendant's face was red and swollen following the fight outside. The witness returned to the bar.

In two, three or four minutes he saw Rivera come into the bar with a cut finger. Isabelle was taking care of the wound. Then defendant came into the tavern and he heard Hilda say, "Here he is" and then Rivera pushed Isabelle to the side and walked about one or two steps forward when the defendant started shooting. The defendant and Rivera were about 10 or 12 feet apart when the shots were fired; both men were standing at the time. When Rivera was first shot he "spun" but was still standing. He thinks there were three





or four shots fired. There were no shots fired when Rivera was lying on the ground. Hilda took a knife from Rivera's pocket.

After the shooting someone kicked the gun from the defendant's hand. The defendant was standing in the doorway at the time. He did not tell the investigating officers about the knife Hilda took. He does not know where she can be located.

Testimony of Fred Howard, a policeman, called by the defense:

He interviewed Isabelle Camacho at a police station following the shooting. Isabelle did not know of her own knowledge the source of the cut on Rivera's hand. Medina never told him about the knife.

Testimony of Dr. Herman Reyes, a physician for the City of Chicago House of Correction, called by the defense:

He examined the defendant on May 13, 1968, and found bilateral periorbital hematoma and facial contusion hematoma (a swelling of both eyes caused by blood under the skin and a similar condition of the side of the face). He discharged the defendant on May 14, 1968. He saw the defendant in the hospital again on May 17, 1968. Aside from the hematoma noted above, the defendant also suffered subconjunctival hematoma (hemorrhages into the coat of the eyeball). All of these conditions were brought on by trauma. The defendant also complained of lower back pain.

He saw the defendant again on May 20th; he complained of lower back pain. On May 21st he sent the defendant to the eye clinic at the Cook County Hospital. The hematoma could be described as a couple of black eyes.

Testimony of Collette Ahern, a nurse at the House of Correction, called by the defense:

She admitted the defendant on May 12, 1968, and noticed that his face was "puffy," his eyes were discolored, he had discolored areas on both his upper arms that appeared fresh and there was



also an abraded area on his right knee. On May 13, 1968, the defendant complained of a headache and both of his eyes and his face remained discolored and swollen. She administered an ice pack.

She next saw the defendant in the hospital on May 17, 1968. The defendant complained of back pain and was instructed to stay in bed. On May 22, 1968, the defendant still had discolored eyes and was sent to the eye clinic the same day. In her opinion it is rare that someone is kept in the hospital for two weeks for a black eye and a scraped knee.

At this point in the trial the defense made an offer of proof as to the testimony of Dr. Henry which the court refused to allow to go to the jury. Several stipulations were entered including the fact that the defendant had \$1173.89 in cash at the time he was arrested.

Testimony of Luis Vega in his own behalf:

He is 37 years old, married, with three children. He is five feet four inches tall and weighs 153 pounds. He has a fourth grade education and is a former marine. He has known Medina since childhood. Medina was the bartender in his tavern which he sold several days before the shooting.

He owns a .38, "small gun, silver and white on the top," which is registered. He sold his bar on April 7, 1968, and was not employed from April 7th until the time of the shooting because he was making plans to move his family back to New York.

He was in the Caguas Club twice on May 11, 1968, once at about eleven in the morning to tell Medina that he was leaving that night to go to New York, and at about eight-thirty or nine o'clock in the evening. On this later visit Hilda Ortiz, owner of the Caguas, approached the defendant and offered to sell him the Caguas. He declined because he was leaving Chicago. Hilda



then introduced the defendant to Elvira and Isabelle Camacho and Rivera, none of whom he had met previously.

He bought drinks for the three of them and paid for the drinks with a \$10 bill from the roll of money he carried in his pocket. Hilda was present when he paid the bartender, Medina. He denies having an argument with Rivera inside the tavern. He left the Caguas Club about ten forty-five or eleven o'clock because,

I look around and I see Miss Hilda and Mr. Rivera talk all the way down there in the kitchen and Hilda point the finger to me like that, and that far away I can hear what they talking each other. And I told Victor, I say, "I don't want no more drinks, I going to go," and I walked through that door.

When he walked through the door, Rivera followed him and said, "I want to talk to you." When the defendant turned around, Rivera had a knife with a black handle in his hand. He said to Rivera, "If you want to talk to me why do you have a knife." Rivera replied, "That is not for you mother fucker" and he jumped on the defendant. Rivera raised his right hand holding the knife and cut the right shoulder of the defendant's clothing.

He got me with the end of the knife because I pulled his from me, and when I pulled his hand I fought with him and the knife, the two hands is closed and he cut in his finger.

Rivera continued to strike the defendant with the butt of the knife handle. Rivera was on top of him while he was hitting the defendant. Medina came out of the bar during the fight and said, "Don't let them kill that guy." Hilda told Medina, "Go back to the place. The place is empty and somebody is going to get in there. Take care of the place." Medina then pulled off one of the assailants and returned to the bar. The defendant was being beaten by Rivera; "two guys come with him and another guy from the bar" were holding his hand and Hilda Ortiz was kicking him. He was beaten for about four or five minutes. During the struggle





someone tried to get into his pocket. Some time during the beating Rivera got off the defendant and kicked him in the teeth causing the defendant to lose a tooth. When the defendant managed to get free, he ran into the tavern, pulling his gun from his pocket. As he entered the tavern he heard Hilda say, "He come by, kill the mother fucker, take the money from him."

Then Rivera ran at him saying, "I am going to kill this mother fucker. I am going to kill, I am going to take care of him now." Rivera was pulling a knife from his pocket as he ran at the defendant. "Well, I think he going to get the knife, I start shooting, shooting, and I shoot I don't know how many times I shoot \* \* \*." The shots were fired in quick order. Then someone kicked the gun from his hand. The people then pushed him out of the door, telling him, "Run, go away, they are going to kill, they are going to kill you." He drove to Artesian and North Avenue and called the police. He called the police a second time from Western and Harrison and waited there for the police car for 15 or 30 minutes.

At this time he was dizzy and had trouble walking, talking and seeing. He couldn't see from his right eye and his nose was bleeding. He had pain in his face and knees and his lip was injured.

His gun is a five shot revolver and had five bullets in the chamber. When he was asked if he always carried a gun he replied, "I never carry no gun before until that night because that night I got my money in my pocket and I got to go to New York that night." He was served two drinks that night but only drank one. He danced with Mrs. Camacho, the older woman, one time.

Testimony of Dr. Edward Shalgos, called by the State: (His testimony was given during the State's case in chief but is placed here for purposes of continuity.)





He is a pathologist who examined the body of the decedent. He found an entry wound on the lower part of the right elbow and an exit wound on the upper part of the right elbow. Both wounds were on the back of the arm. There were also two wounds just above the waist that entered in the back, travelled upward and exited the chest. There was ~~an~~ an entry wound near the base of the skull (in the back of the head) caused by a bullet which travelled upward and remained in the skull underneath the skull bone which it shattered. In his opinion the decedent would have to have been standing on a ladder above the assailant, lying down, or be standing while the assailant was lying down in order to inflict such wounds. The wounds in the elbow could have been inflicted if the decedent had his arms outstretched in front of him and the assailant fired at about the same level.

There was a total of five bullets fired into the body of the deceased. There was also a laceration on the left thumb of the deceased. This was a transverse cut -- along the length of the thumb. The wound "was of the type that is observed in defense wounds." This was a fresh wound. The blood test of the deceased showed 141 mg. of ethynol or 141 mg. percent alcohol.

#### Opinion

Defendant's first contention is that he was not proven guilty beyond a reasonable doubt since the evidence showed that he acted justifiably in self-defense in shooting Rivera. He argues that he was being beaten with the intent to rob him. With some help from Medina he was able to extricate himself from the fray and reenter the tavern anticipating safety. Instead of safety he found his chief tormentor approaching him with outstretched arms. Fearing for his life he fired his gun as fast as he could.



Defendant's argument is not supported by the evidence.

Defendant was harassing Rivera's companion, Isabelle; she testified that defendant asked Rivera to go outside; there was no testimony which placed Rivera near defendant when he pulled out his money, and Medina testified that defendant displayed his roll of money in the evening when he paid for the drinks and paid Medina \$5. On cross-examination Medina stated that he was paid the \$5 in the morning. Although at least two men were holding defendant while he was being beaten, his money was not taken from him.

It is undisputed that Rivera came into the tavern after the altercation and that Isabelle was treating his wounded hand when defendant reentered. Medina testified that this occurred "2, 3 or 4 minutes" after the fight terminated but Isabelle and her mother testified that fifteen minutes elapsed before the defendant reentered. There is a conflict in the evidence as to whether Rivera took one or two steps toward defendant or whether after he pushed Isabelle aside upon seeing defendant he was immediately shot. Medina testified that Hilda Ortiz took a knife from Rivera's pocket after he was shot. The State's evidence disclosed that at least three bullets entered Rivera's body after he fell to the floor.

Ill. Rev. Stat. 1967, ch. 38, par. 7-1, provides:

Use of Force in Defense of Person.]  
A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony.

In People v. Jordan, 18 Ill. 2d 489, 492, 165 N.E.2d 296, the court stated:

In order that a killing be justified on the grounds of self-defense it must appear that the danger was so urgent and pressing that in order to save the defendant's own life



or to prevent his receiving great bodily harm the killing of the other was absolutely necessary and it must appear also that the person killed was the assailant or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given.

In the instant case the jury could properly find that there was ample evidence that defendant was not in urgent danger, that killing was not absolutely necessary to prevent his receiving great bodily harm and that at the time of the shooting the person killed was not an assailant.

Justifiable self-defense is always a question of fact for the jury and we will not disturb its verdict unless the evidence is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. People v. Jordan, supra, at 492, 493. We will not disturb the jury's finding that defendant did not justifiably act in self-defense.

The question as to whether a manslaughter verdict should be tendered by the defense in a murder case is often important but one which is usually decided by defense counsel as a matter of tactics. Nevertheless, defendant's second contention is that even though no manslaughter instruction or verdict was tendered, the trial judge, in the interests of justice, should have exercised his discretion in raising the issue of offering a jury instruction and verdict form on voluntary manslaughter and on his own initiative should have given the jury an instruction and verdict form on voluntary manslaughter.

In People v. Taylor, 36 Ill.2d 483, 488, 224 N.E.2d 266, the court discussed this problem at length and stated that:

[F]ailure to give a manslaughter instruction cannot be asserted as a ground for reversal in a reviewing court unless such an instruction has been requested. [Citations omitted.]

Later, at 491, the court further stated:

We therefore adhere to our present procedure, and hold that the trial judge did not err in failing to give a manslaughter instruction on his own initiative.





Finally defendant contends that the anticipated testimony of a treating physician as to statements made by the defendant relating to the cause and history of his injuries was an exception to the hearsay rule and should have been admitted.

Defendant made the following offer of proof of the testimony of Dr. Roy Henry who was the first doctor to examine the defendant. If called to testify Dr. Henry would state:

Last night while leaving a bar he [the defendant] was assaulted by unknown persons, beaten and kicked in the face, was seen in dispensary earlier and sent to the Cook County Hospital for x-rays.

The court then stated:

That statement is inadmissible and the Court will not permit that portion of the record to be read to the jury nor will the Court permit Doctor Henry to testify as to that portion of the history.

The court relied on People v. Colletti, 101 Ill. App.2d 51, 242 N.E.2d 63, in its ruling. This reliance was misplaced because the proffered self-serving testimony in Colletti did not fall within an exception to the hearsay rule. Here it did. The exception is discussed in Shell v. Industrial Commission, 2 Ill.2d 590, 602, 119 N.E.2d 224, wherein the court stated:

It is an exception to the hearsay rule, however, that declarations of an injured person to his treating physician as to his physical condition, and the cause thereof are admitted in evidence for the reason that it is presumed that a person will not falsify such statements to a physician from whom he expects and hopes to receive medical aid.

The fact that the testimony may have been favorable to the defendant does not, of course, render it inadmissible. Shell, supra, 602.

Therefore, the court should have allowed the proffered testimony of defendant's treating doctor. However, defendant was not prejudiced by the court's action because the fact that defendant and Rivera fought outside the tavern was undisputed anyway, and we





are satisfied beyond a reasonable doubt that the error was harmless. Chapman v. California, 386 U.S. 18. We also note that the defendant's injuries were well documented both by oral testimony and photographs taken after his arrest.

The judgment is affirmed.

AFFIRMED.

Lorenz, P.J., and English, J., concur.

(Abstract)



ABST.



55733

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
CHARLES L. WHITE,	)	Hon. Chester J. Strzalka,
	)	Presiding.
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Charles L. White (defendant) was indicted for aggravated battery causing great bodily harm, Ill.Rev.Stat. 1967, ch.38, par.12-4(a); for aggravated battery by use of a deadly weapon, Ill.Rev.Stat. 1967, ch.38, par.12-4(b) (1) and for attempt murder, Ill.Rev.Stat. 1967, ch.38, par.8-4. After a jury trial, he was found not guilty of attempt murder and guilty of aggravated battery. The court sentenced him to a term of from three to five years in the penitentiary. In his appeal to this court, defendant contends that his privately retained trial lawyer gave him such inadequate representation that his constitutional rights were violated; that the court erred in its instructions to the jury; that the court failed to consider his application for probation and that his sentence was too severe and should be reduced.

No contention is raised regarding sufficiency of the evidence to prove defendant guilty of aggravated battery beyond a reasonable doubt. We will, however, state a summary of the pertinent facts.

The victim of the battery in this case was the mother of a child said to be fathered by defendant. She was contemplating marriage to another man. On the date in question, the victim



heard her dog barking at the front door. She asked twice who was there without response. She opened the door and saw defendant with a gun in his hand. He pulled the trigger but the weapon misfired. The victim turned and ran and she was shot in the back. When she fell, defendant put the gun to her head and fired again but she was able to divert his hand and thus avoided the shot. At that time the baby and a young lady were present in the apartment. The latter heard the shots and saw defendant with the pistol in his hand. A neighbor, who knew defendant and had seen him on that same day, heard the shots and saw defendant running away. It is undisputed that the victim suffered great bodily harm and that she was hospitalized for a long period of time.

Defendant offered evidence of an alibi. Two friends of his testified that he was in their apartment at the time of the shooting. Rebuttal evidence presented by the State cast serious doubt upon the credibility of one of these alibi witnesses. We find that the verdict of guilty of aggravated battery is amply supported by the evidence beyond any reasonable doubt.

The argument regarding incompetency of defendant's trial counsel, retained by him, is based upon details of the opening argument made by this counsel to the jury; failure to make objection to prejudicial testimony regarding the fact that defendant was the father of the victim's baby; request for statements and minutes of grand jury testimony in the presence of the jury and failure of counsel to tender a jury instruction regarding alibi.

Many cases have established the standard required for a showing of incompetence of privately retained counsel. The law



is clear that the incompetency of the lawyer must amount to no representation at all so that in effect the proceedings are reduced to a farce or a sham. This is the standard adopted by our courts in determining whether defendant has been deprived of effective assistance of counsel, in derogation of his constitutional rights. *People v. Riojas*, 47 Ill. 2d 47, 265 N.E.2d 865; *People v. Bliss*, 44 Ill.2d 363, 255 N.E.2d 405. Our courts have consistently held that this degree of incompetence is not established where counsel has failed to object to inadmissible evidence or has made other errors in judgment or trial strategy. *People v. Newell*, 48 Ill.2d 382, 387, 268 N.E.2d 17; *People v. Bliss*, 44 Ill.2d 363, 370, 255 N.E.2d 405.

Furthermore, a showing of actual incompetence of counsel is not sufficient without a demonstration of "\*\*\*\*substantial prejudice resulting therefrom, without which the outcome would probably have been different." *People v. Stepheny*, 46 Ill.2d 153, 157, 263 N.E.2d 83, citing from *People v. Morris*, 3 Ill.2d 437, 439, 121 N.E.2d 810. We find no such prejudice in this case. On the contrary, the result obtained by trial counsel for defendant in the verdict of not guilty of attempt murder demonstrates eloquently that defendant received ample and able representation.

One complaint regarding trial counsel leads us to the second point raised by defendant regarding alleged failure of the court to instruct the jury on the issue of alibi. Trial counsel for defendant tendered no instruction on the issue of alibi and the court gave none. This was entirely proper on the part of the court and counsel. IPI-Criminal recommends that no instruction be given on the subject of alibi. The Committee





note shows that this type of instruction would be improper as a comment on one particular phase of the evidence. See IPI-Criminal 24.05.

Defendant next complains that the trial court erred in denying his motion for probation. The record shows that counsel for defendant made an application for probation. The court then proceeded with a hearing in aggravation and mitigation. The court then denied the application for probation. As defendant concedes in his brief, he had no inherent or statutory right to be admitted to probation. Granting or refusal of probation rests within the discretion of the trial court. *People v. Smith*, 111 Ill.App.2d 283, 288, 250 N.E.2d 178. Defendant urges that the State's Attorney told the court that defendant was previously convicted of disorderly conduct and also of assault with a gun. Defendant replied that he was involved in the gun incident in another State but that he was released, "\*\*\*because it was self-defense." The court then denied the application for probation. In view of all of the facts and circumstances shown by this record, we cannot find that the trial court abused its discretion in denying defendant's motion for probation.

Defendant's final contention is undue severity of his sentence. The legal reasons for and against reduction of sentence are well set forth in *People v. Lampley*, 1 Ill.App.3d 282, 274 N.E.2d 171, including the dissenting opinion. In the case at bar, defendant could have been sentenced to a longer prison term as recommended by the State. The sentence actually imposed was well within applicable statutory limits. We do not find in this record any circumstances which impel us to exercise our power to reduce the sentence. The burden of presenting mitigation



falls upon defendant and we cannot find here the type of substantial showing which is required to justify reduction of the sentence. See *People v. Nelson*, 41 Ill.2d 364, 367, 243 N.E. 2d 225. The judgment and sentence are affirmed.

Judgment affirmed.

BURKE, J. and LYONS, J. concur.





7 I.A.<sup>3</sup> 931

56715

PEOPLE OF THE STATE OF ILLINOIS,  
Plaintiff-Appellee,

v.

MARCUS FULLER,  
Defendant-Appellant.

ABST.  
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Hon. Thomas R. McMillen,  
Presiding.

MR. PRESIDING JUSTICE DIERINGER delivered the opinion of the court:

This appeal was transferred to this court by the Supreme Court. The petitioner, Marcus Fuller, appeals from an order entered in the Circuit Court of Cook County dismissing a post-conviction petition.

Petitioner Fuller was indicted for three offenses of armed robbery and one offense of attempted armed robbery. On November 7, 1968, Fuller pleaded guilty to all indictments and was sentenced by the trial court to serve concurrent sentences of five to eleven years in the Illinois State Penitentiary on each indictment.

In January, 1970, pursuant to the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., Ch. 38, § 122, Fuller filed a pro se post-conviction petition in which he alleged a substantial denial of his constitutional rights by the trial court. The petitioner alleges in the post-conviction petition that since the trial court did not grant him a previously agreed upon sentence for the offenses charged, his guilty pleas were involuntary and coerced. In support of this allegation, the petitioner attached his own affidavit to the post-conviction petition. In this affidavit, the petitioner states his guilty pleas were based on the assurance of his attorney that he would be sentenced to a term of not less than two years nor more than three years on each indictment, such sentences to run concurrently. Following appointment of counsel for the petitioner, the trial court held a hearing at which the State moved to dismiss the petition filed by Fuller for failure



to raise a constitutional question as required by the Illinois Post-Conviction Act, and for failure to adequately support the claims presented therein. The trial court sustained the State's motion to dismiss the petition. This appeal arises from that dismissal.

The issues which the petitioner presents on appeal are whether the post-conviction petition set forth a substantial denial of his constitutional rights, thereby entitling the petitioner to a full evidentiary hearing, and whether the petitioner was denied effective representation of counsel at and prior to the hearing on his petition for post-conviction relief.

The petitioner's initial contention is the trial court should have granted him an evidentiary hearing as to the allegation in his post-conviction petition. This allegation was that his guilty pleas were involuntary and coerced, thereby amounting to a denial of his constitutional rights as a result of the failure of the trial court to grant him the previously agreed upon sentences for the offenses charged. The sole basis for the petitioner's contention is his own affidavit in which he states his privately retained counsel assured him he would receive concurrent sentences of two to three years for his guilty pleas rather than the concurrent sentences of five to eleven years which the trial court gave him.

We do not accept the petitioner's contention that the trial court should have granted him an evidentiary hearing as to the allegation in the post-conviction as valid. Both the petition and the affidavit attached thereto are totally devoid of any specific factual allegations concerning the agreement which the petitioner contends led to his pleas of guilty. Since there is no factual information presented, the petitioner's allegation amounts to an unsupported conclusion. The law in Illinois is well-settled that allegations which amount to mere conclusions are not sufficient to require an evidentiary hearing. People v. Heaven, (1970) 44 Ill.2d 249. We therefore reject the petitioner's





contention that the trial court should have granted him an evidentiary hearing.

The petitioner's second contention is that he was denied effective representation by counsel at and prior to the hearing for post-conviction relief. The petitioner bases this contention on the grounds that his court-appointed counsel not only failed to amend the petitioner's original post-conviction petition, but also did not independently seek supporting evidence for the allegation contained in such petition.

In accord with our rejection of the petitioner's previous contention, we also reject this contention. The Illinois Supreme Court has consistently held that where there is not a showing that sufficient facts or evidence exist, inadequate representation will not be found because of an attorney's failure to amend a petition or, when amended, failing to make the petition's allegations factually sufficient to require the granting of relief. People v. Stovall, (1970) 47 Ill.2d 42.

For the reasons stated herein, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.





17 I.A.<sup>3</sup> 935  
ABST.

No. 56265

THE PEOPLE OF THE STATE OF ILLINOIS, )	
Plaintiff-Appellee, )	APPEAL FROM THE
vs. )	CIRCUIT COURT OF
JOSEPH GUY, )	COOK COUNTY
Defendant-Appellant. )	HONORABLE
	DANIEL J. RYAN,
	PRESIDING.

MR. PRESIDING JUSTICE LORENZ delivered the opinion of the court:

The defendant was charged with murder on February 5, 1971. Defendant entered a plea of guilty to the offense of voluntary manslaughter when he was brought to trial on March 23, 1971 and received a sentence of not less than one nor more than ten years.

On appeal defendant contends that his plea of guilty was obtained without substantial compliance with Illinois Supreme Court Rule 402. Ill. Rev. Stat. 1969, ch. 110 A, par. 402, amended and effective September 17, 1970. That Rule commands that there be "substantial compliance" with specified standards in hearings on pleas of guilty.

Defendant maintains that there was no compliance with subsection (a) of Rule 402 because the trial court neither addressed him personally in open court to determine that he understood the nature of the charge against him nor informed him that he had a right to plead not guilty. We cannot agree. The record discloses that the court admonished the defendant in the presence of his counsel about the nature of the charge. The defendant was present when his counsel entered the plea of not guilty. Defendant then told the court that he understood he was pleading guilty to the charge of voluntary manslaughter. The court was also careful to comply with the two other requirements of subsection (a) of Rule 402. First, defendant was advised of the consequences of his plea (waiver of a jury trial and waiver of the right to confront the witnesses against him.)



Secondly, the defendant was advised of the minimum and maximum penalties for voluntary manslaughter. In this regard, our review of the record clearly indicates to us that the trial court issued adequate admonitions to defendant concerning the nature of the charge and the consequences of the guilty plea. This is the purpose of the subsection, and there was substantial compliance.

Defendant next argues that the Court did not determine that the plea was voluntary before accepting it. Subsection (b) of Rule 402 requires that the Court determine the voluntariness of the plea by both questioning the defendant in open court and confirming the terms of the plea agreement. The record affirmatively discloses that the defendant entered his plea understandingly and voluntarily. It in no way shows that defendant was misled or wrongfully induced to enter his guilty plea. On the contrary, the record leaves no doubt that the defendant acted with full understanding at this stage of the proceedings. The terms of the agreement were also confirmed to defendant by the Court's questions concerning the fact that his attorney had reached a specified agreement in a conference with the judge and State's Attorney. When asked if he realized a particular agreement had been reached, defendant answered in the affirmative. There was substantial compliance with subsection (b).

Next, defendant maintains that the trial court did not comply with subsection (c) of Rule 402 because there was no determination that a factual basis existed for the plea. The record in this case indicates there was also compliance with this provision. In the presence of defendant, defense counsel stipulated that the facts as stated in the indictment were sufficient to sustain the lesser included offense of voluntary manslaughter. Subsection (c) does not require any particular type of inquiry or investigation by the court to determine the factual basis for the plea. See People v. Doe (1972), \_\_\_ Ill. App.3d \_\_\_. The stipulation, as well as other comments by the trial court, indicate that the trial court had determined that a factual basis existed for the plea.



Finally, defendant maintains that he was not afforded the opportunity to offer mitigating evidence into the record. Subsection (d) of Rule 402 provides that where a tentative plea agreement has been reached, the court may receive evidence in aggravation and mitigation--with the consent of the defendant. The permissive language of this subsection and the emphasis it places on defendant's need to consent to such a hearing leads us to conclude that defendant waives his right to such a hearing where he does not make a request for one. In this case the record reveals that no such request was made.

For all of the above reasons, the judgment is affirmed.

Affirmed.

DRUCKER and ENGLISH, JJ., concur.

[ABSTRACT ONLY]







ABST.  
I.A.<sup>3</sup> 939

56558

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY.
	)	
v.	)	
	)	
ROBA BEATTY,	)	HONORABLE
	)	PHILLIP ROMITI,
Defendant-Appellant.)	)	PRESIDING.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Defendant, Roba Beatty, was convicted after a bench trial of theft\* (Indictment No. 70-2262) and sentenced to a term of two to four years. There were 11 additional indictments for theft outstanding at the time of his conviction. His original plea as to these indictments was not guilty but after the conviction on 70-2262 he changed his plea to guilty on all of them and was sentenced to terms of two to four years to run concurrently with the previously imposed two to four year sentence.

The Public Defender was appointed to represent defendant on appeal and he now moves for permission to withdraw as attorney of record. He has filed a brief in support of his motion pursuant to Anders v. California, 386 U.S. 738. A copy of the motion and the accompanying brief were mailed to defendant on July 13, 1972. Defendant was advised that he had until September 5, 1972, to file any points of his choice in support of his appeal. He has not responded.

In the Public Defender's motion to withdraw he has stated that after reviewing the common law record and the transcript of the proceedings it was his belief that the only basis for an appeal would be: (1) Whether the defendant was proven guilty of theft, in Indictment No. 70-2262, beyond a reasonable doubt and (2) whether the court properly admonished the defendant of the

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\* Ill. Rev. Stat. 1971, ch. 38, par. 16-1.



significance and consequences of his change of plea from not guilty to guilty on the additional 11 theft indictments.

A summary of the evidence adduced at the trial on Indictment No. 70-2262 follows. The State's evidence showed that defendant was employed as a real estate broker at Landa Realty Company. Mr. and Mrs. Theodore Heath approached him for the purpose of purchasing a home. Defendant showed them various homes and they eventually expressed an interest in purchasing the home at 10644 South Eggleston. The down payment was to be \$1200 and the total purchase price \$22,500. On October 28, 1969, Mrs. Heath gave defendant \$500 cash and in return received an "offer to buy" the home at 10648 South Eggleston and a receipt for the \$500 for property at 10519 South Normal Avenue. The Heaths called the defendant's attention to the errors in the addresses but the defendant replied that he would correct them. Defendant kept \$200 of the \$500 and gave the other \$300 to the bookkeeper for Landa Realty. Defendant told the bookkeeper that the money was earnest money for purchase of the property at 10519 South Normal.

On December 19, 1969, the Heaths gave defendant \$45 for a credit check and received a receipt stating it related to the purchase of property at 10648 South Eggleston. Defendant again assured the Heaths that he would rectify the mistake in the address.

From January 5, 1970, to February 24, 1970, the Heaths gave defendant an additional \$850 representing further down payment and closing cost expenses. Defendant kept these payments.

In March 1970 Mrs. Heath attempted to contact the defendant at Landa Realty but was informed that he no longer worked there. Only \$300 of the money collected by defendant was deposited with Landa Realty.

The defendant testified in his own behalf. He acknowledged



the various receipts of money from the Heaths and the confusion of addresses as noted above. He attributed this confusion to the fact that there were prospective purchases of more than one home; that the Heaths initially signed an offer to purchase the home at 10519 South Normal; that this deal fell through; that thereafter they signed an offer to purchase the home at 10644 South Eggleston; that any references to 10648 South Eggleston were typographical errors; that he attempted to find the Heaths a new home but was unsuccessful; that the Heaths never requested the return of their money and that he never returned any. He left the employ of Landa Realty in May 1970. Defendant further testified that he kept all of the money except for the \$300 as part of his commission in the event he found a home for the Heaths.

We agree with the Public Defender that the argument that defendant was not proven guilty beyond a reasonable doubt is wholly frivolous. The trier of fact determines the credibility of witnesses and his decision will not be reversed unless the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt. People v. Hoffman, 45 Ill.2d 221, 258 N.E.2d 326. The above evidence amply supports the court's finding that the defendant obtained unauthorized control over the property of the Heaths with the intent to permanently deprive them of it.

We also agree with the Public Defender that defendant was adequately admonished of the significance and consequences of his change of plea from not guilty to guilty on the 11 additional theft indictments pending against him. Guidelines to be followed in accepting a plea of guilty are set forth in Supreme Court Rule 402. Ill. Rev. Stat. 1971, ch. 110A, par. 402. We have reviewed the record and find that the trial judge precisely complied with every provision of the rule.

We have made "a full examination of all the proceedings" as



required by Anders in addition to reviewing the brief filed by the Public Defender. We find that there are no legal points "arguable on their merits" and that the appeal is wholly frivolous. The Public Defender is given leave to withdraw, and the judgment of the Circuit Court is affirmed.

AFFIRMED.

Lorenz, P.J., and English, J., concur.

Abstract only.





## STATE OF ILLINOIS

ABST.

## APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the  
State of Illinois, sitting at Springfield:

## PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

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BE IT REMEMBERED, that to-wit: On the 25th day  
of October A. D. 1972, there was filed in the office of  
the Clerk of the Court an opinion of said Court, in words and figures  
following:



STATE OF ILLINOIS  
IN THE APPELLATE COURT  
FOURTH DISTRICT

---

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
vs	)	
DON OWEN RAHN,	)	
Defendant-Appellant,	)	Appeals from
and	)	Circuit Court
STEVE CHARLES HOKE, DON OWEN RAHN, and	)	Cass County
DANIEL L. WRIGHT,	)	
Defendants-Appellants.	)	

---

MR. JUSTICE SIMKINS delivered the Opinion of the Court.

Defendants Hoke, Rahn and Wright were indicted and charged with criminal damage to property. This charge arose out of the breaking of windows in the Hagener Township building on the night of March 8, 1971, which resulted in damages of over \$200. In addition, defendant Rahn was indicted and charged with arson, which involved the burning of the West Point School by means of igniting gasoline. On June 3, 1971, defendants plead not guilty and a trial date was set. Subsequent to plea



negotiations, defendants withdrew their pleas of not guilty and entered their pleas of guilty to the charges against them. Judgment was entered on the pleas on June 28, 1971. Defendants Hoke and Wright were sentenced to the Illinois State Penitentiary for a period of one to three years. Rahn was committed to the juvenile division of the Department of Corrections for a period of one to three years. Rahn was also sentenced on the arson charge and committed to the juvenile division of the Department of Corrections for one to three years. This sentence was to run concurrently with the one imposed on the criminal damage to property charge. The Illinois Defender Project was appointed counsel for defendants on these appeals which we have consolidated for purposes of opinion.

Appellant-defense counsel have filed briefs pursuant to the requirements of *Anders v California* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, stating that review of the cases would be frivolous in the absence of justiciable issues and seek leave to withdraw. We continued the motions for a period of six days during which the defendants were given leave to file additional points and authorities. None have been filed.

The motions to withdraw discuss the sufficiency of the court's admonishment to defendants which would appear to be the only possible issue on review. As suggested by the briefs, the judge in the trial court complied with provisions of Supreme Court Rule 402 in the following matters: (1) they were informed of the nature of the charges; (2) they were informed of the



minimum and maximum sentence prescribed by law; (3) they were informed of their right to plead not guilty; (4) they were informed that if they plead guilty, there would not be a trial, so that by pleading guilty, they waived their right to trial by jury and their right to be confronted by the witnesses against them; (5) the court determined that the pleas were voluntary; (6) the court determined that there was a factual basis for the pleas; and (7) the court made the provisions of the plea negotiation agreements a matter of record.

We have examined the records and concur in the view of appointed counsel that further review of these cases would be frivolous. The admonishments here under review were adequate under Supreme Court Rules. The defendants entered their pleas of guilty knowingly and voluntarily and there were factual bases for the pleas. The motions of counsel to withdraw should be and the same are allowed and the judgments of the circuit court of Cass County are affirmed.

Judgments affirmed.

Craven, P.J. and Smith, J. concur.





ABST.

17 I.A.<sup>3</sup> 970

54581



PEOPLE OF THE STATE OF ILLINOIS, )

Plaintiff-Appellee, )

v. )

NEIL KRAUSE, )

Defendant-Appellant.)

) Appeal from the Circuit

) Court of Cook County.

) L. Sheldon Brown, J.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Neil Krause was indicted for attempt murder, aggravated battery, theft and the unlawful use of weapons within five years of his release from the penitentiary. After a motion for substitution of judge was denied, he changed his plea from not guilty to guilty as to each offense. The court inquired as to the voluntariness of his plea and then sentenced him to the penitentiary for concurrent terms, the lowest of which was not less than one year nor more than five years, and the highest not less than six years and not more than six years and one day.

The defendant, pro se, presents seven issues for review. The fundamental issue, which affects four of the others, is whether his plea was made with a full understanding of the consequences. He contends that it was not because he was not advised of his privilege against compulsory self-incrimination and his right to confront his accusers, and because there was not a judicial determination that his plea had a factual basis. The first two points are



grounded on Boykin v. Alabama, 395 U.S. 238 (1969). Boykin does not compel specific admonitions and waivers with respect to all constitutional rights. The question is not whether the defendant was advised of all of his rights and all of the consequences of a guilty plea but whether the record affirmatively discloses that his plea was entered understandingly and voluntarily. People v. Reeves, 50 Ill.2d 28, 276 N.E.2d 318 (1971). The defendant was advised by his attorney or the court of his right to have a jury trial and to have the evidence presented. The court also admonished him of the consequences of his plea and the penalties which could be imposed for the offenses for which he was indicted. He persisted in his plea. The record shows that he voluntarily and understandingly pled guilty to all the offenses.

Following the acceptance of the plea, it was stipulated that the indictment was true and correct and that if the State were required to offer evidence, the facts introduced would be sufficient as a matter of law to sustain a conviction on each count. No evidentiary details were presented. The defendant argues that this was error because Rule 402 (c) (Ill.Rev.Stat., 1971, ch. 110A, para. 402(c)) provides that the court shall not enter a final judgment on a plea of guilty without first determining that there is a factual basis for the plea. The rule is inapplicable to the present case. The rule did not take effect until September 1, 1970; the defendant entered his plea July 28, 1969. Since the requirements of the rule are neither constitutionally mandated (People v.



Nardi, 48 Ill.2d 111, 268 N.E.2d 389 (1971)) nor applied retroactively (People v. Howland, 2 Ill.App.3d 553, 276 N.E.2d 818 (1971)) the trial court did not err in accepting the stipulation in lieu of evidence.

The four issues which are affected by the plea of guilty are the defendant's assertions that his arrest was illegal, that he was not brought before the most accessible magistrate within a reasonable period of time, that he was not permitted to call an attorney or a member of his family and that the trial court erred in denying his motion for substitution of judge. These issues will not be considered. The defendant's plea of guilty, which was voluntarily and understandingly entered, not only obviated the need to introduce evidence, but also waived all non-jurisdictional defects and errors. People v. Brown, 41 Ill.2d 503, 244 N.E.2d 159 (1969); People v. Schnexnyder, 1 Ill.App.3d 571, 274 N.E.2d 688 (1971).

We also cannot consider the defendant's contention that his constitutional rights were violated because he was transferred to the penitentiary after he had been granted a thirty-day stay of mittimus. The record does not provide sufficient information for the determination of this issue.

The seventh issue concerns the sentences imposed on the defendant. He argues that these were excessive and improper in that they did not provide for a sufficient spread between the minimum and



maximum terms. The sentences, six years to six years and one day for attempt murder, five years to five years and one day for theft and five years to five years and one day for unlawful use of a weapon, do not permit the exercise of discretion by the parole board. The sentence for aggravated battery, one year to five years, does. The minimum sentences, however, are not excessive per se; and the maximum sentences are minimal considering the defendant's record and the four distinct and separate crimes committed by him: the attempted murder of a policeman, the theft of an automobile, battery upon a peace officer and the possession and discharge of a firearm within five years of his release from the penitentiary. The hearing in aggravation and mitigation revealed that his prior criminal record included convictions for petty theft in 1960, theft in 1962 and robbery in 1964.

Although the philosophy of the statutory provisions in regard to parole (Ill.Rev.Stat., 1969, ch. 38, paras. 123-1 to 123-7) is defeated by the sentences which in effect make the parole eligibility date the same as the release date, we are not disposed under the circumstances of this case to reduce the minimum sentences but would, if it were within our authority, provide for a greater spread by increasing the maximum. The sentences run concurrently and the most the defendant can serve is six years — and less than that if he behaves himself. Six years is not an excessive sentence





for one who has a criminal record and who commits four serious crimes within a short time after being released from the penitentiary. A measurable spread between the high and low sentences while always advisable (People v. Monroe, Ill.App.3d , N.E.2d (1972) [No. 55455, filed August 3, 1972]) is not mandatory. It need not be ordered in every case by a court of review — particularly not if the defendant's recidivist proclivity makes remote the possibility of rehabilitation and the punishment which has been imposed upon him is immoderately lenient.

The judgment is affirmed.

Affirmed.

McGlooin, P.J., and McNamara, J., concur.



56702



ABST.

17 I.A.<sup>3</sup> 978

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	Appeal from the Circuit
	)	
v.	)	Court of Cook County.
	)	
	)	
GARY COTTEN,	)	Robert J. Downing, J.
	)	
Defendant-Appellant.	)	

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Gary Cotten pleaded guilty to the crimes of attempt murder and aggravated kidnapping. He was sentenced to concurrent terms of 10 to 20 years and 10 to 30 years on the respective charges.

The Public Defender, who was appointed to represent Cotten on appeal, has filed a motion for leave to withdraw. The motion, supported by a brief as required by Anders v. California, 386 U.S. 738 (1967), states that the only basis for an appeal would be whether Cotten's plea of guilty was properly accepted. The brief concludes that it was and that an appeal could not possibly be successful. The defendant was notified of the motion and a copy of the brief was sent to him. He was informed that he could file whatever additional points he wished in support of his appeal. He has not responded.

We have examined the record and concur in the opinion of the defendant's counsel that the appeal is without merit. Cotten was informed of the nature of the charges against him, the penalties



prescribed by the law for the offenses, his right to plead not guilty, to have a jury trial and to confront the witnesses for the State. The court determined that he understood what he had been told, that his plea was voluntary, was based on facts establishing his guilt and was not induced by threats or promises. The court stated that it had participated in a conference with the defendant's counsel and the assistant State's attorney relating to the plea and sentence, and outlined the terms agreed upon. The defendant said he understood all this and persisted in his plea.

The trial court fully complied with the requirements of the rule pertaining to pleas of guilty (Ill.Rev.Stat., 1971, ch. 110A, para. 402) and no error of any kind appears in the record upon which an appeal could be based. The motion to withdraw is allowed and the judgment is affirmed.

Affirmed.

McGlooin, P.J., and McNamara, J., concur.





7 ABST.  
I.A. 1001

57395

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	APPEAL FROM THE CIRCUIT
Appellee,	)	COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
JAMES ALLEN,	)	Hon. Saul A. Epton,
	)	Presiding.
Appellant.	)	

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

James Allen (defendant), was indicted for rape (Ill.Rev. Stat. 1969, ch.38, par.11-1(a)) and also for deviate sexual assault (Ill.Rev.Stat. 1969, ch.38, par.11-3). Upon his plea of guilty, on August 30, 1971, entered after a conference with his lawyer and an assistant state's attorney, he was found guilty of both offenses and judgments were accordingly entered. He was sentenced to two concurrent terms of four years to four years and one day in the penitentiary.

On his appeal to this court, his counsel of record has filed a motion supported by a brief requesting leave to withdraw as his attorney pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed.2d 493, 87 S.Ct. 1396 (1967). Written notice of the motion, and also a copy of the brief, were served by mail upon the defendant. In addition, on July 21, 1972, this court caused a letter to be mailed to defendant directing his attention to the copies of the petition and brief previously mailed and stating that the court had given him until August 21, 1972 to file any points that he might choose in support of the appeal. No communication has been received by the court from defendant pursuant to this letter. We have examined the brief submitted by counsel for defendant together with the entire





record. The brief suggests that a review of the record indicates that the only basis for appeal would be whether procedural rules were duly observed in receiving the plea of guilty. Ill.Rev.Stat. 1971, ch.38, par.115-2 and Supreme Court Rule No. 402 (Ill.Rev.Stat. 1971, ch.110A, par.402). The conclusion was reached that all requirements and safeguards were fully complied with.

Our own examination of the record discloses that this conclusion is correct. We find that each and all of the manifold requirements of the statute and the rule were scrupulously observed by the trial court in receiving this plea of guilty and in entering judgment accordingly.

The motion of attorney for defendant for leave to withdraw is therefore granted and the judgment and sentence are affirmed.

Judgment affirmed.

BURKE, J. and LYONS, J. concur.





ABST.

7 I.A.<sup>3</sup> 1001

57474

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
Plaintiff-Appellee,	)	
	)	CIRCUIT COURT,
vs.	)	
	)	COOK COUNTY.
EDWARD LEMON,	)	
Defendant-Appellant.)	)	HON. JAMES M. BAILEY,
		Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

Defendant entered a plea of guilty to an indictment charging him with the offense of burglary. He was found guilty as charged in the indictment and was placed on probation for a period of three years, the first five months of which were to be served in the county jail.

Ten months later a rule was issued to show cause why defendant's probation should not be revoked, on the ground that defendant had committed and been convicted of the offense of criminal trespass to vehicle within the period of probation. Defendant was represented by the Public Defender of Cook County at the hearing on the rule and admitted at the hearing that he was the same person who was convicted of the aforementioned offense. Defendant's probation was revoked, and he was sentenced to a term of two years to ten years in the penitentiary, the sentence to run consecutively with his one year sentence for criminal trespass to vehicle.

The Public Defender of Cook County was appointed counsel for the defendant on appeal and has filed in this court a petition for leave to withdraw as appellate counsel. Pursuant to the requirements set out in the case of *Anders v. California*, 386 U.S. 738, the Public Defender also filed a brief in support of his petition, alleging that the appeal is frivolous and without



merit. This court thereafter notified the defendant of the pending petition and granted him leave to file points in support of the appeal. Defendant has not responded.

The petition and brief of the Public Defender allege that the sole question which could be raised on appeal relates to the procedural propriety of the hearing on the rule to show cause. Examination of the entire record by this court, as required by the Anders decision, reveals that no issue could be raised on appeal other than that alluded to by the Public Defender. Examination of the record further reveals that a contention raised on appeal as to whether defendant was denied procedural due process of law in his probation hearing would be without merit.

Defendant, who was represented by counsel at the hearing, was apprised by the trial court that he was accused of violating his probation. He admitted to the court that he was the same person who had theretofore been convicted of the criminal trespass to vehicle, committed during the period of probation. A review of the proceedings at the hearing on the rule to show cause reveals that the procedure followed conformed substantially to that required by statute and case law of this state governing the matter. (Ill.Rev.Stat.1971, Chap. 38, Para. 117-3; People v. Price, 24 Ill.App.2d 364, 164 N.E.2d 528; People v. Dwyer, 57 Ill.App.2d 343, 206 N.E.2d 113.)

From all the circumstances disclosed by the record, we conclude that the appeal is frivolous and wholly without merit. The Public Defender of Cook County is granted leave to withdraw as counsel for defendant on appeal. The judgment of conviction is affirmed.

PETITION ALLOWED.  
JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.





HENRY A. GENTILE and RAYMOND	)	APPEAL FROM
L. TERMUNDE,	)	
Plaintiffs-Appellees,	)	CIRCUIT COURT,
	)	
vs.	)	COOK COUNTY.
	)	
AVERY WILKINS, et al.,	)	HON. EDWARD EGAN,
Defendants-Appellants.)		Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

This is an appeal by the defendants, members of the Board of Trustees of the Village of Alsip, Illinois, from an interlocutory order granting a temporary injunction to the plaintiffs, Mr. Henry A. Gentile and Mr. Raymond L. Termunde. Mr. Termunde is the Village President of Alsip. The injunction restrains the defendants from "...interfering with the exercise by Mr. Gentile of his duties as Village Attorney of the Village of Alsip or interfering in any way with the receipt by said Henry A. Gentile of the fees and emoluments due him, and from disbursing or attempting to disburse or authorize the disbursement of funds to any other persons for legal services rendered purportedly as attorney for Village or for contractual legal services..."

The facts giving rise to this appeal are as follows. On February 7, 1972, the Board of Trustees passed an ordinance which announced their dissatisfaction with the legal services provided by Mr. Henry A. Gentile and which purported to terminate his employment by the Village and retain as Special Counsel Mr. Will Geirach. Under the terms of the ordinance, Mr. Geirach, a practicing lawyer, was to serve until April 30, 1973, at a monthly retainer of \$300. He was to furnish legal services to the Village as needed.

After the Village president vetoed the ordinance, at its next regular meeting on February 22, 1972, a





passed the ordinance over the veto.

The plaintiffs filed a verified complaint seeking a declaratory judgment to have the ordinance declared null and void, claiming that the power to appoint or remove the Village Attorney rests by statute in the Village president subject to the advice and consent of the Board. Defendants filed a Motion to Strike the Complaint and plaintiffs filed a Motion For Temporary Injunction. On May 23, 1972, a hearing was held at which no testimony was taken or evidence presented. On June 5, 1972, an order was entered denying defendants' Motion to Strike the Complaint and granting the request for a temporary injunction. From that order the defendants appeal.

The sole question on this appeal is whether the chancellor abused his discretion in granting the temporary injunction. It is well-settled law in Illinois that the trial court has extensive discretionary powers in granting an order for temporary injunction and unless the reviewing court finds that the discretion has been abused the order will not be set aside. *Lonergan v. Crucible Steel Co. of America*, 37 Ill.2d 599, 229 N.E.2d 536.

In resolving the question of abuse of discretion in this case, we consider only the verified complaint, since no answer was filed by the defendants. The well-pleaded allegations of fact must be taken as true for purposes of this appeal. (*Gifford v. Rich*, 58 Ill.App.2d 405, 208 N.E.2d 47; *H.K.H. Development Corp. v. Metropolitan Sanitary Dist. of Greater Chicago*, 47 Ill.App.2d 46, 196 N.E.2d 494.) The complaint alleges sufficient facts to raise a fair question as to the existence of the plaintiffs' rights, establish that the plaintiffs would probably be entitled to the relief sought if their proof supports their allegations, and make it appear advisable that the positions of the parties remain the same pending a hearing on the merits. *H.K.H. Development Corp.*



After examining the allegations of the complaint, we conclude that there was no abuse of discretion. The complaint alleged that Henry A. Gentile was duly appointed, with the advice and consent of the Board of Trustees, to the post of Village Attorney in 1961 by Raymond L. Termunde, who was then and is now, the duly appointed and acting Village President of Alsip. It further alleged that Gentile has been annually reappointed to the post of Village Attorney and has never been removed by the President from the office. It is alleged that the power to appoint various officials of the Village lies in the Village President, with the advice and consent of the Board, and that with this power to appoint goes the power to remove the officials. Next, the complaint alleges that the Board attempted to remove Mr. Gentile as Village Attorney by passing the ordinance in issue here, that the ordinance was vetoed by the Village President, and that the Board repassed the ordinance after veto. Finally, the complaint alleges that the ordinance (a copy of which was attached to the complaint) was invalid because the Board had no power to remove Henry Gentile from the office of Village Attorney. On the strength of these allegations, the chancellor could properly find that the temporary injunction should be ordered.

The defendants raise several issues in their brief and in the Motion to Strike the Complaint. Among them are whether the office of Village Attorney does in fact exist and whether the ordinance as passed discontinued the office if it did exist prior to that time.

Rather than settle these issues on an appeal from a temporary injunction order, we leave them to a hearing on the merits of the cause, where both parties may present evidence in support of their respective arguments. As this court stated in H.K.H. Development Corp.,



"The ultimate issues of a controversy are usually not brought before a reviewing court by an interlocutory appeal, but are reserved for the trial.[Citation.] It is not the purpose of a temporary injunction to determine controverted rights or to decide the merits of a case. An interlocutory injunction is granted before the hearing of a case for the purpose of preventing a threatened wrong or the further perpetration of an injury."

We find that the complaint contained allegations of a prima facie case and that the trial court did not err in granting the temporary injunction and denying the defendants' motion. The temporary injunction will not, of course, prevent the defendants from arguing the merits of their case at trial.

The order is affirmed.

ORDER AFFIRMED.

GOLDBERG, P.J., and LYONS, J. concur.



ABST.



7IA<sup>3</sup>1009

56985

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
Plaintiff-Appellee, ) APPEAL FROM THE CIRCUIT  
 )  
v. ) COURT OF COOK COUNTY.  
 )  
SAM BROCCOLO, ) Hon. Thomas J. Janczy,  
 ) Presiding.  
Defendant-Appellant. )

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendant was charged with the unlawful use of a weapon. Ill.Rev.Stat. 1969, ch.38, par.24-1(a)(2). After a bench trial, he was found guilty and fined fifty dollars. On appeal defendant contends that his arrest without a warrant and the search of his person were improper; that he was not proved guilty beyond a reasonable doubt; and that the complaint was invalid.

On October 8, 1971, defendant went to the Gale School in Chicago to see the school principal. At the school, defendant became involved in a disturbance, and Fred R. Fleming, the school engineer-custodian, and another school employee were summoned. The police were also called. Fleming testified that as he approached and started talking to defendant, the latter pulled an object from his pocket and threatened to slice Fleming's throat. At first Fleming thought that the object was a knife, but then discovered that it was an unopened straight razor. Defendant repeated the threat, but subsequently left the building. The police arrived as defendant was leaving.

Officer DeCina of the Chicago Police Department testified that upon his arrival at the school he had a conversation with Fleming. Fleming told the officer that the man walking away had just threatened him with a razor. The officer went down the street about half a block, stopped defendant, searched him and found the razor in defendant's pocket. Fleming watched the police officer make the arrest and search.

Defendant, 81 years of age and a barber, testified that five months previously, teen-age boys had vandalized his shop. He went to the school to get the principal's cooperation in contacting the parents. At the school, Fleming, dressed in over-





alls, approached, and defendant testified that Fleming "looked so mean, and so sarcastic, you know, he scared me." Defendant further testified that he took the razor out and said that if he were touched, he would give Fleming a shave. Fleming and the other employee agreed not to touch him, and defendant left the building. Defendant testified that when he was a block away, a police officer came running up, arrested and searched him. Defendant stated that he was taking the razor to a grinder.

Defendant initially argues that the police officer did not have probable cause to arrest him, and that the search of his person was improper. Illinois statute, Ill.Rev.Stat. 1969, ch.38, par.107-2 provides in part:

A peace officer may arrest a person  
when:

\*\*\*

(c) He has reasonable grounds to  
believe that the person is committing  
or has committed an offense.

The test of probable cause is whether a reasonable and prudent man in possession of the knowledge which has come to the arresting officer would reasonably believe that the person to be arrested is guilty of the crime. People v. Bambulas, 42 Ill.2d 419, 247 N.E.2d 873. The factual basis for the arresting officer's belief need not be as persuasive as that necessary for the conviction of defendant for a crime. People v. Peak, 29 Ill.2d 343, 194 N.E.2d 322.

The police officer in the instant case had probable cause for making the arrest. The officer received an immediate complaint from a citizen that he had been threatened with a razor, and the citizen pointed out defendant as the perpetrator. These facts gave the officer reasonable grounds to believe that defendant had committed an offense, and to make a valid arrest.

Since the arrest was valid, the police officer had the right to make a search of defendant's person without a warrant either to protect himself from attack, or to discover any objects which may have been used in the commission of the offense. Ill.Rev.Stat. 1969, ch.38, par.108-1(a) (d).

Defendant next contends that he was not proved guilty of the charge beyond a reasonable doubt, apparently arguing that the



State had not proved the requisite intent. The statute, Ill.Rev. Stat. 1969, ch.38,par.24-1(a)2 provides in part as follows:

Unlawful Use of Weapons.

(a) A person commits the offense of unlawful use of weapons when he knowingly:

\*\*\*

(2) Carries or possesses with intent to use the same unlawfully against another, a dagger, \*\*\* razor,\*\*\* or any other dangerous or deadly weapon or instrument of like character;

The statute, Ill.Rev.Stat. 1969, ch.38,par.4-4, defines intent as follows: "A person intends or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct."

While intent must be proved beyond a reasonable doubt, it may be inferred from the circumstances. People v. Gooch, 70 Ill. App.2d 124, 217 N.E.2d 523. Ordinarily intent must "be proved circumstantially by inferences drawn from conduct appraised in its factual environment." People v. Johnson, 28 Ill.2d 441, 443, 192 N.E.2d 864.

Defendant's intent to use the weapon unlawfully against another was clearly shown by the facts and circumstances adduced at trial. While brandishing the razor, defendant, without provocation, twice threatened to slice the school engineer's throat. Moreover, these acts occurred during a disturbance at the school apparently caused by defendant. The trial court properly found that defendant's actions indicated that he intended to use the weapon against Fleming, and we will not disturb the court's judgment.

Defendant's final contention is that the complaint was invalid because, in signing it, Fleming used his employment address rather than his home address, and also because the complaint was not signed under oath. This contention is without merit.

The law does not require that the complaining witness's address appear on the complaint. Ill.Rev.Stat. 1969, ch.38,



par.102-9. Moreover, under the circumstances, Fleming's use of the school address on the complaint is understandable and proper. An examination of the record does not support defendant's additional argument that the complaint was not signed under oath. The complaint discloses that Fleming's signature was verified by a judge of the circuit court.

For the reasons stated, the judgment of the circuit court is affirmed.

Judgment affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.





ABST.

71A<sup>3</sup>1040

57149

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Respondent-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT
vs.	)	OF COOK COUNTY.
	)	
FRED ANDRIESSE,	)	HONORABLE
	)	FRANCIS T. DELANEY,
Petitioner-Appellant.	)	PRESIDING.

MR. JUSTICE LYONS delivered the opinion of the court:

The defendant, Fred Andriesse, has appealed from a dismissal of his petition for post-conviction relief. He contends that the court erred by dismissing the post-conviction petition and that he was inadequately represented by counsel during the post-conviction proceedings.

The record discloses that defendant was indicted in 1968 for the murder of one Carol Sue Edleman. Defendant retained private counsel and thereafter entered a plea of guilty to the charge. Following a judgment of guilt and a hearing in mitigation and aggravation, defendant was sentenced to serve not less than fifteen nor more than twenty-five years in the Illinois State Penitentiary. No appeal was taken from the judgment and sentence.

On January 13, 1970, defendant filed a pro se petition for post-conviction relief and alleged therein: (1) that the court erred by failing to conduct a competency hearing prior to his trial; (2) that his privately retained counsel was incompetent; and (3) that he was not advised of his right to appeal. Defendant also requested the court to appoint counsel to represent him in the post-conviction proceedings. The court appointed the Public Defender and the State moved to dismiss the petition. On June 2, 1970, a hearing was held on the State's motion. At this hearing, defense counsel elected to stand on the pro se petition but the court, noting several deficiencies in the pro se petition,







directed defense counsel to visit defendant at Menard Prison and then submit a petition in proper form. The hearing was continued until June 18, 1970.

Pursuant to the court's direction, defense counsel filed a supplemental petition for post-conviction relief on June 18, 1970, alleging therein that defendant's constitutional rights had been violated because: (1) he was denied a competency hearing; (2) he was denied adequate representation of counsel; and (3) he was denied the right to appeal. The State moved to dismiss the supplemental petition and the court heard argument on the State's motion. Thereafter, the court denied the post-conviction petition and this appeal ensued.

Defendant initially contends that the court erred in dismissing the post-conviction petition because the petition presented a sufficient allegation that he was improperly denied a competency hearing prior to trial. The thrust of defendant's argument seems to be that the trial court, on its own motion, should have ordered a competency hearing prior to trial. The record discloses that the court, on June 20, 1968, at the request of defense counsel, entered an order permitting an examination of defendant by the Behavior Clinic. Defendant was subsequently examined for both sanity and competency and a report was submitted to the court by Dr. William H. Haines, a psychiatrist. Dr. Haines' report indicated the following diagnosis:

Adult Situational Reaction with Immaturity.  
He knows the nature of the charge and is  
able to cooperate with his counsel.

Defendant argues that this diagnosis was sufficient to have raised a bona fide doubt of his competency and, therefore, the court should have conducted a competency hearing pursuant to Ill.Rev.Stat. 1967, Ch.38, par.104-2. We do not agree. The test for incompetency, as set forth by statute, Ill.Rev.Stat. 1967, Ch. 38, par.104-1, is whether a person is unable because of a mental



condition to understand the nature and purposes of the proceedings against him or assist in his defense. The psychiatric report expressly states that defendant was fully competent under this test. No contrary evidence was introduced. Hence we find no abuse of discretion by the trial court in its failure to conduct a competency hearing. See *People v. Bortnyak*, 1968, 39 Ill. 2d 545, 237 N.E.2d 451; *People v. Williams*, 1969, 105 Ill.App.2d 25, 245 N.E.2d 17. We note also, in this connection, that we have carefully considered defendant's additional arguments on the issue of competency and find them equally unpersuasive.

Defendant next argues that the court erred in dismissing the post-conviction petition because the petition sufficiently alleged that he was denied his right to appeal. The record, however, fails to support defendant's argument and indeed discloses that defendant was sufficiently admonished by the court concerning his rights to an appeal as required by Supreme Court Rule 605 [Ill.Rev.Stat. 1967, Ch.110A, par.605].

Defendant finally argues in support of his first contention that the trial judge on his own motion should have excused himself from the post-conviction proceedings because it seemed that he had certain knowledge, dehors the record, concerning the truth or falsity of fact allegations in the post-conviction petition. We find this argument unpersuasive and, in addition, we note that the court's sole purpose was to rule on the legal sufficiency of the post-conviction petition and supporting affidavits. In our view, the court's ruling was entirely correct.

Defendant finally contends that he was denied effective representation by counsel during the post-conviction proceedings. The record, however, discloses that counsel fully complied with the provisions of Supreme Court Rule 651(c) [Ill.Rev.Stat., Ch.110A, par.651(c) (effective Jan. 1, 1970)], which sets out minimum requirements for adequate representation by appointed



counsel in post-conviction proceedings. In addition, counsel vigorously argued defendant's position in lawyerlike fashion during the hearing on the State's motion to dismiss. We are entirely satisfied, therefore, that defendant enjoyed adequate and effective representation during the post-conviction proceedings.

The judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J., concur.



ABST.



JULARD CONSTRUCTION COMPANY, a corporation, )

Plaintiff-Appellant, )

vs. )

PHILIP THOMSEN, )

Defendant-Appellee. )

) APPEAL FROM THE  
) CIRCUIT COURT OF  
) COOK COUNTY) HON. ALLEN F. ROSIN,  
) Magistrate Presiding.7 IA<sup>3</sup> 1059

MR. JUSTICE BURMAN delivered the opinion of the court.

This action was brought to recover the balance due on an oral contract under which the plaintiff, Julard Construction Company (hereafter referred to as Julard), acted as general contractor on the construction of a single family residence for the defendant, Dr. Philip Thomsen, on the basis of the cost plus eight (8%) per cent. The defendant, in his answer, denied that the construction was completed in accordance with the agreed upon plans and specifications, and he filed a counterclaim to recover damages resulting from the incomplete and defective workmanship in the building. After a bench trial, judgment was entered for the defendant on the complaint and for the counter-defendant on the counterclaim. The plaintiff appeals.

The testimony and exhibits presented at trial are long and involved since they deal with many of the details of construction. The only question before us is whether there was evidence which, if believed, warranted the finding of the trial judge. We conclude upon a review of the entire proceeding that we would not be justified in reversing the judgment. No useful purpose would be served in reciting the evidence in detail.

It is initially urged by the plaintiff that the quality of workmanship was not raised by the pleadings. We disagree. The Complaint alleged that the work under the oral contract was completed in December, 1964, and the defendant took occupancy in November, 1964. The answer denied that the project was ever



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completed according to the agreed plans and specifications. In construing a particular phrase in a pleading, it is necessary to look to the pleadings as a whole. The defendant, in the counterclaim attached to the answer, alleged, "\*\*\*plaintiff has failed and refused and continues in his refusal to complete in a workmanlike manner repair and/or replace various phases of the construction work which are contrary to the (plans and specifications)." Faulty and defective work is not completed until the faults and defects are cured. The allegation of incompleteness in the answer encompassed not only that which was not done, but also that which was done in an unworkmanlike manner and not remedied. The issue of the quality of construction was thereby raised in the pleadings.

The record reveals that there was testimony given by several witnesses which, if believed, indicated significant variations from the plans and specifications and substantial defects and deficiencies in workmanship which still existed at the time of trial. There was also evidence of overcharges.

Obviously this was a case for the trier of the facts. This court cannot, and will not, weigh the evidence. That was the duty of the trial court who saw and observed the witnesses on the stand, took into consideration their truthfulness, their bias and interest in the case, and who was in a superior position to understand the evidence and to draw inferences therefrom and to evaluate the conflicting testimony.

The finding and judgment of the trial court will not be disturbed unless erroneous. City of Waukegan v. Drobnick, 123 Ill.App.2d 465. We have reviewed the record and cannot say that the court's finding is against the manifest weight of the evidence and plainly wrong.

For the foregoing reasons the judgment of the Circuit Court is affirmed.

AFFIRMED.











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